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The statistics presented in a bulletin recently issued by the Census Office, bearing on the subject of homicide in the year 1890, are deserving of attention, and will have some interest for the legal profession. It appears that out of 82,329 prisoners in the United States on June 1, 1890, the number charged with homicide was 7,386, or 8.97 per cent. Of these 4,425 were white, 2,739 negroes, 94 Chinese, 1 Japanese and 92 Indians. Omitting a small number charged with double crimes, 94.65 per cent. of the homicides were men and 5.35 per cent. were women. A careful and accurate inquiry into the parentage of those born in the United States, results in the conclusion that 56.14 per cent. of homicide committed by white men and women is chargeable to the native white element of the population, and 43.86 per cent. to the foreign element. The percentage of those who can read and write is 61.73; of those who can read only 4.84, and of those who can do neither 33.43. Of the negroes more than one-half can neither read nor write; of the Indians nearly two-thirds, while the percentage of illiteracy among the foreign-born is nearly or quite three times as great as that among the native whites. The number of homicides who have received a higher education amounts to 3.44 per cent. of the whole. More than four-fifths have no trade, but the foreign-born and their children have much more generally acquired a trade than the native whites, and the native whites than the negroes. The greater number were employed at the time of their arrest.

One of the features of the bulletin is the presentation of the main points in the law of homicide in the United States, showing its legal varieties and its varying definitions in the several States and territories, together with the varying sentences authorized by law.

The summary shows that the criminal law, particularly as regards homicide, is in a very confused state indeed. It appears that there are three States, viz., Rhode Island, Michigan and Wisconsin, in which the death penalty has been abolished by law, while there is one in which it has been practically abolished though not by law, viz., Kansas, where no date has been fixed for the execution of any prisoners since 1872, and where 49 out of 158 prisoners awaiting execution were found in 1890. One feature noticed in reference to punishment for crime is that the tendency to greater severity increases slightly from east to west and from north to south. The average sentence less than for life is 13 years and 292 days. It is greater for men than for women and for negroes than for whites, but the highest average sentence is pronounced upon Chinamen.

Mr. F. W. Wines, the expert by whom the bulletin was prepared, says, in a concluding section, that the investigation has furnished demonstration of the erroneous nature of certain prevalent beliefs, namely, as to the predisposing causes of crime and as to the effect of severity of punishment upon the volume of crime. In reference to the causes of crime it is said that ignorance is a cause of crime, yet 66.57 per cent. of all prisoners charged with homicide have received the rudiments of an education, in English or in their own tongue, and 3.44 per cent. have received a higher education. So ignorance of a trade is said to be a cause of crime, still 19.35 per cent. are returned as mechanics or apprentices, and a much larger number have the necessary skill to follow mechanical pursuits. Idleness also is a cause of crime, nevertheless 82.21 per cent. were employed at the time of their arrest. So intemperance is a cause of crime, though a less active and immediate cause than is popularly supposed, yet 20.10 per cent. were total obstainers, and only 19.87 per cent. were returned as drunkards.

In reference to the popular supposition that the prevalence of crime is chiefly due to inadequate punishment, and that the remedy for it is to be found in harsher laws and a rigorous administration of them by the courts, Mr. Wines contends that if this were so, there should be less homicide relatively to the population, in the south central division than in any other. The percentage of sentences for twenty years and over is there greater than in any other division, and the average sentence pronounced by the courts is

longer. In these respects, the western division stands almost side by side with the south central. Yet the ratio of prisoners charged with homicide to the total population of these divisions is, he says, much higher than elsewhere; it is more than double the ratio for the other three divisions taken together. The lowest average sentence is in the north Atlantic division, where there are also the fewest death sentences, except in the south central, and yet the ratio of prisoners charged with homicide in the north Atlantic division is less than in any other. The ratio of prisoners charged with homicide in Rhode Island, where the death penalty has been abolished, is lower than in any other State in the north Atlantic division, except in Massachusetts. The number of executions in 1889, as reported by the sheriffs, was relatively largest in the western division, where it was 1 in 178,095 of the population. Yet it was in this very division that the ratio of prisoners charged with homicide was also greatest. The next largest ratios of executions to the population were in the south Atlantic (1 in 205,998) and south central (1 in 215,155) divisions. Yet these are the divisions in which are also found the next largest ratios of prisoners charged with homicide. It is frequently said that lynching takes place where the law is not executed, and that it is designed as a protest against the inefficiency of the courts. But the sections in which there are the most executions are those in which there are also the most lynchings. The number of executions and of lynchings reported by the sheriffs in the southern States is identically the same. It is further to be noted that the largest number both of executions and of lynchings is in the south central division, where the average sentence for homicide is the longest, and where the percentage of long sentences imposed by the courts is the highest.

NOTES OF RECENT DECISIONS.

MEASURE OF DAMAGES — DESTRUCTION OF UNHARVESTED ICE.—The Supreme Court of Pennsylvania hold in Stauffer v. Miller Soap Co., 25 Atl. Rep. 95, that the measure of damages for the destruction of an unharvested crop of ice, there being no circumstances of aggravation, is its value at the time and place of destruction; and in arriving at this, there being no market value for ice until later in the season, and after it was stored, a deduction should be made, not only for the cost of harvesting and storing, but for loss and waste in cutting and handling and from shrinkage. Heydrick, J., says:

As the plaintiff presented his cause in the evidence, it was substantially a claim for the destruction of an unharvested crop of ice. There being no circumstances of aggravation, compensation was the measure of damages to which he was entitled. And, if all analogies are to be regarded, the value of the ice upon the pond at the time of its destruction was a proper subject of inquiry. In actions for cutting timber, whatever the range of the evidence may be, it must all tend to show the value of the standing trees, or "stumpage," as it is called, at the time and place of the trespass, (Herdic v. Young, 55 Pa. St. 176; Coxe v. England, 65 Pa. St. 212); and in actions of trespass for digging and carrying away minerals, and of replevin for minerals dug and taken away by a wrongdoer, the value of the minerals in place is the measure of damages (Forsyth v. Wells, 41 Pa. St. 291; Coleman's Appeal, 62 Pa. St. 252; Ege v. Kille, 84 Pa. St. 333). But authority ought not to be needed for a proposition so plain as that to allow a recovery for the enhanced value of anything by reason of the labor bestowed upon it by a trespasser is not to award compensation to the plaintiff, but to punish the defendant; and it would be as little consonant with the rule of compensation to allow a plaintiff to recover for an enhanced value that might have been, but was not, given to property destroyed through the inadvertence or misfortune of the defendant. It, however, not unfrequently happens that there is no market value of property taken or destroyed at the time and place of the trespass. In such cases the value of the property in the nearest market, if necessary, in an altered form, less the cost of getting it to that market and changing the form, is the measure of the damages; it is the value at the place of the trespass. Herdic v. Young, *supra*. The only question in this case about which there appears to have been a serious controversy was as to the value of the ice crop destroyed, and this involved an inquiry as to the quantity. It does not appear that there was any market price for ice upon ponds or elsewhere during the winter, in Lancaster county; but it is inferable from the testimony that it had a market value later in the year, in the houses in which it was stored, and that, in addition to the labor and expense of harvesting and storing, there was considerable loss in cutting and handling, and perhaps much more from shrinkage during the period it was necessarily stored before the market opened. In such case it is clear that the measure of damages would be the value in the nearest market, having respect as well to time as to place, less the cost of getting it into that market; and a part of the cost would be the loss in handling and from shrinking; and therefore it is manifest that it would be gross injustice to the defendant to charge him at the market price in the spring or summer for every ton of ice that could be shown by an arithmetical calculation to have been upon the pond in February. According to Herdic v. Young, *supra*, it was competent for the plaintiff to show what ice was worth when and where there was a market for it, but, having done so, it was clearly competent for the defendant to prove that the plaint

iff's ice would not have been worth so much upon the pond if it had been uninjured by the acts complained of; and this might be done by showing that it was of a quality inferior to that which brought the prices stated by plaintiff's witnesses, as well as by showing the cost of cutting and housing, either by cross-examination of the same witnesses or by the direct testimony of others. And while to the inexperienced it might seem fair for the plaintiff to prove by a civil engineer the quantity of ice of a given thickness that was upon this pond, upon the assumption that it was of uniform thickness and quality all over the pond, and seek to charge the defendant with the whole of it at the market price months later, it ought not to be doubted that it was competent for the defendant to show by witnesses acquainted with the business that so much ice could not have been gathered from that pond, and saved until there was a market for it.

TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—DAMAGES FOR PAIN AND SUFFERING.—In Chapman v. Western Union Telegraph Co., 15 S. E. Rep. 901, the Supreme Court of Georgia lay down the law for that State on the subject of the liability of telegraph companies for damages on account of mental pain and suffering in the failure to deliver telegrams announcing illness and death. The court, after an exhaustive review of the authorities which are to be found on both sides of the question, concludes that such damages are not allowable. With this decision the State and federal courts are at one on the point in the State of Georgia. Lumpkin, J., says, in the course of a lengthy opinion:

The question has not been ruled on by this court. The expressions used in Cooper v. Mullins, 30 Ga. 152, do not cover it, because that was a case of physical injury. But there is no lack of authority in other jurisdictions. The trouble lies in the directly opposite views of the several learned courts which have passed upon the question. Consequently the two conflicting lines of decision may be compared, to ascertain which is the more consonant with long-established and well-recognized principles. The Supreme Court of Texas, in 1881, held that damages are recoverable for such an injury. So in Relle v. Telegraph Co., 55 Tex. 308. No direct authority is cited for this ruling, but the court adopts as law a bare suggestion made by the text writers Shearman and Redfield in their work on Negligence, (volume 2, § 756). The cases referred to in the opinion were actions for physical injuries, of which the mental agony forms an inseparable component. But the decision is followed with more or less restriction by the same court in numerous later cases. Railroad Co. v. Levy, 59 Tex. 542, 563; Stuart v. Telegraph Co., 66 Tex. 580; Loper v. Same, 70 Tex. 689, 8 S. W. Rep. 601; Telegraph Co. v. Cooper, 71 Tex. 507, 9 S. W. Rep. 598; Same v. Broesche, 72 Tex. 654, 10 S. W. Rep. 734; Same v. Simpson, 73 Tex. 422, 11 S. W. Rep. 385; Same v. Adams, 75 Tex. 533, 12 S. W. Rep. 857; Same v. Feegles, 75 Tex. 537, 12 S. W. Rep. 860; Same v. Moore, 76 Tex. 66, 12 S. W. Rep. 949; Same v. Richardson, 79 Tex. 649, 15 S. W. Rep. 689; Same v. Rosentreter (Tex. Sup.), 16 S. W. Rep. 25; Same v. Jones, *Id.* 1006; Telephone Co. v. Grimes (Tex. Sup.), 17 S. W. Rep. 831; Potts v. Telegraph Co. (Tex. Sup.), 18 S. W. Rep. 604. This doctrine has involved the court in some inconsistencies, as shown by the opinion in Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. Rep. 823, and by Judge Thompson's article on this subject in 35 Cent. L. J. 5. Compare Cases of Stewart, Adams, Feegles, Moore, Rosentreter, and Potts, *supra*, with those of Telegraph Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. Rep. 70; Telegraph Co. v. Brown, 71 Tex. 723, 10 S. W. Rep. 323; and Rowell v. Telegraph Co., 75 Tex. 26, 12 S. W. Rep. 534. Nevertheless the Texas doctrine has gotton a strong following in other courts. Beasely v. Telegraph Co. (U. S. Cir. Ct. Tex.), 39 Fed. Rep. 181; Chapman v. Same (Ky.), 13 S. W. Rep. 880; Young v. Same, 107 N. C. 370, 11 S. E. Rep. 1044. See Thompson v. Same (N. C.), 11 S. E. Rep. 269; Sherrill v. Same (N. C.), 14 S. E. Rep. 94; Wadsworth v. Same, 86 Tenn. 695, 8 S. W. Rep. 574; Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. Rep. 419; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. Rep. 163; Thomp. Elect. § 378 *et seq.*

The Alabama and Indiana courts have gone no further than holding that the sender of the message can recover for mental suffering. In Illinois it was cautiously held that nominal damages, "at least," might be recovered. Logan v. Telegraph Co., 84 Ill. 468. These rulings involve various perplexing questions on which they do not all agree. Whether the person to whom the message is sent, as well as the sender, can recover; whether the action is grounded in contract or in tort; whether the violation of a contract involving feeling is a proper basis for awarding substantial damages for injury to feelings alone; to what extent the message must show on its face the family relationship; whether the damages to be given are in their nature punitive or compensatory—these are the chief problems encountered, and solved in variant ways. Some of the cases rest on breach of contract; of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. Cases of Henderson, Richardson, Levy, Chapman, and others. This view grapples with the big question, how can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? See Walsh v. Railroad Co., 42 Wis. 23. The answer given is that the subject-matter of the contract is feeling, and the damage to feeling by non-compliance was plainly in contemplation of the parties making the contract. The breach of many a contract, which the injured party desires performed, brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort, or breach of common law or statutory duty, the contract serving merely to create the relation of duty between the parties. Cases of Young, Reese, Stuart, Wadsworth, and others. The difficulty arising here is whether, as there is no tort independently of the contract, the contract can rightly be treated as not precluding recovery in tort, and the telegraph company be dealt with in this respect, like a common carrier. A tendency is observed to escape this difficulty by applying Code provisions which abolish the distinction between contract and tort, and allow the plaintiff to recover on a simple statement of the facts of his case, Stuart and Wadsworth Cases. In this State no such abolition has been effected. Regarding the nature of the damages, the majority opinion in this class of decisions is that they

are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is willful, wanton, or malicious.

As against the above authorities, there are strong decisions denying the right of substantial recovery altogether. West v. Telegraph Co., 39 Kan. 93, 17 Pac. Rep. 807; Russell v. Same, 3 Dak. 315, 19 N. W. Rep. 408; Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. Rep. 823; Chase v. Same (U. S. Cir. Ct. Ga.), 44 Fed. Rep. 554; Crawson v. Same (U. S. Cir. Ct. Ark.), 47 Fed. Rep. 544. And see able dissenting opinion of Lurton, J., in Wadsworth's Case, *supra*. This seems to us the sounder view of the law. It is remarkable that the opinions declaring in favor of recovery can point to no positive authority older than the first Texas decision, in 1881. They do refer to certain classes of cases where mental suffering is admitted as an element to be considered by the jury in making their estimate of the damages, namely, actions for slander or libel, for seduction, for assault without physical injury, for breach of promise of marriage, and for physical injuries. But, in every one of these, it has been maintained that there is a necessary and inseparable ingredient of pecuniary injury. See Telegraph Co. v. Rogers, *supra*. In slander and libel, where the action is founded on words not actionable *per se*, there must be proof of special damage. And where the words are actionable *per se* they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency. Besides, malice (express or implied) is an essential element in such cases. In seduction, it has been necessary from ancient times for the plaintiff to prove a loss of services, or a relation from which such loss might occur, else the action could not be maintained. Thus a brother, not standing *in loco parentis*, however great his anguish, and however keenly he may have felt the disgrace and mortification caused by the wrong-doer, could not recover for his mental suffering. In actions for technical assault, where no physical injury was inflicted or battery committed, damages are said by some of these authorities to be given wholly for mental suffering. Yet it may be that, the injury being essentially willful, substantial damages are given by way of punishing or making an example of the wrong-doer. An assault is an active threat against the body, an offer of violence endangering the person, which the law redresses even in its initial stage, thus protecting the physical person more completely. In actions for breach of promise, the plaintiff's financial loss plays a conspicuous part. Evidence showing the defendant's station and reputed wealth is admissible. At common law, the husband on marriage assumed the wife's debts and responsibility for her torts and for support appropriate to their station. He took a large share of her property by that event, and she acquired some rights in his property. This suffices to show that the breach of marriage promise involved important pecuniary consequences. In actions for physical injuries, the great consideration is the loss of time and the diminution of capacity for work, of course allowing also for the pain endured. So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguishable as mental and another as physical. So, in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered. Johnson v. Wells, 6 Nev. 224; Railroad Co. v. Stables, 62 Ill. 313; Joch v. Dankwardt, 85 Ill. 331; Keyes v. Railroad Co., 36 Minn. 290, 30 N. W. Rep. 888; City of Salina v. Trosper, 27 Kan. 544; 1 Sedg. Dam. § 44; Trigg v. Railroad Co. (Mo.), 6 Amer. & Eng. R. Cas. 345, 348; Dorrah v. Railroad Co., 65 Miss. 14, 3 South. Rep. 36.

In an action for wrongful attachment, on the ground that the defendant was about to dispose of his property with intent to defraud his creditors, it was held that the mortification was a part of the actual damage. Byrne v. Gardner, 33 La. Ann. 6. This was decided by three judges, one of the five being absent and another disqualified, no authority being cited save Sedgwick and the Louisiana Code. Of course it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages. Fisher v. Hamilton, 49 Ind. 341; Stewart v. Maddox, 63 Ind. 51; Coleman v. Allen, 79 Ga. 637, 5 S. E. Rep. 204. Of course, such injuries are essentially willful, and besides are violations of the great right of personal security or personal liberty. Reference has been made also to cases of passengers being put off railway trains, when the mortification, insult and wounded feelings come in to enhance the damages. From the moment the passenger is ordered to get off, he is under duress; his body is not free to remain where he chooses, and where it has the right to be. It is like an illegal arrest or an illegal imprisonment. In all these cases, where personal security or personal liberty is infringed, the mental suffering seems to be a necessary component in the injury. But conceding to the fullest extent that mental suffering enters as an item of damage, or is the *gravamen* of damage, in certain cases it hardly admits of discussion to show that any deduction from them which would sanction a recovery in the present case, for mental suffering alone, would authorize a like recovery in every case attended with mental suffering. But this would be an unwarrantable extension of them; they stand each on its own ground, in well-defined limits.

In Lynch v. Knight, 9 H. L. Cass. 577, Lord Wensleydale expressed the opinion that, where the only injury is to the feelings, the law does not pretend to give redress. Though Mr. Sedgwick (Dam. § 43 *et seq.*) seeks to restrict this language to the case then before the court, and disputes its accuracy as a general proposition, it may be questioned whether the learned author is able to cite a single case sustaining his contention. He does refer to a number of cases, but in all of them the mental pain may be viewed as an accompaniment or part only of some substantial injury entitling the party to compensation. But, even in cases where a recovery must be had on other grounds, it is frequently held incompetent to give damages for the accompanying mental injury. Thus, where a father sues for a grievous physical injury to his minor child, he cannot recover for the laceration of his parental feelings, even in conjunction with damages for the loss of service, though his mental sufferings be necessarily severe and heartrending. Flemington v. Smithers, 2 Car. & P. 292; Black v. Railroad Co., 10 La. Ann. 33; Railroad Co. v. Kelly, 31 Pa. St. 372; Railroad Co. v. Fielding, 48 Pa. St. 320. Statutes have been passed giving recovery for homicide against the slayer, but the policy has invariably been to confine the right of action to a party sustaining pecuniary loss. And in actions on such

statutes, even by the widow of the deceased, grief and anguish cannot come in for compensation. 2 Sedg. Dam. § 573, and cases cited; Field, Dam. § 630, and cases cited; Gillard v. Railroad Co., 12 Law T. 356; Blake v. Railroad Co., 10 Eng. Law & Eq. 437, 18 Q. B. 93, 21 Law J. Q. B. 233; Railroad v. Orr, 91 Ala. 548, 8 South. Rep. 360; Killian v. Railroad Co., 79 Ga. 234, 4 S. E. Rep. 165. Where an action was brought for injury to real estate by blasting, it was held that the plaintiff could not recover for mental anxiety for the safety of himself and family. Wyman v. Leavitt, 71 Me. 227. In forcible entry and detainer, damages for mental anguish cannot be recovered. Anderson v. Taylor, 56 Cal. 131. But in addition to these cases, where damages for mental suffering in conjunction with other damages were refused, cases may be found denying the right to recover where the whole injury is to feeling. Thus where fright caused by negligence of the defendant was so great and sudden as to immediately produce physical sickness and suffering, it is held that damages cannot be had. The principle is that for the mere mental suffering there could be no recovery, and the physical injury is too remote, being unlikely to result from the wrongful act. Commissioners v. Coultas, 13 App. Cas. 222; Fox v. Borkey, 126 Pa. St. 164, 17 Atl. Rep. 604; Ewing v. Railroad Co. (Pa. Sup.), 23 Atl. Rep. 340, 34 Cent. Law J. 236, and 45 Alb. Law J. 211; Lehman v. Railroad Co., 47 Hun. 355; Allsop v. Allsop, 5 Hurl. & N. 534. In Minnesota, however, fright causing nervous convulsions and illness is held to be ground for damages. But even here the action was sustained on account of the physical injury as the proximate result of the negligent act, and not on account of the intervening mental suffering, the court conceding that this alone would not warrant recovery. Purcell v. Railroad Co. (Minn.), 50 N. W. Rep. 1034. So in Bray v. Latham, 81 Ga. 640, 8 S. E. Rep. 64, an injury to health, caused by fright and physical exposure, was held ground for damages. It is hard to conceive of an injury which would wound the feelings more deeply than the disturbance and desecration of the grave of a near relative; yet for such a wrong an action did not lie at common law. The stern doctrine was that there was no property in a corpse, and the only protection of the grave was by criminal indictment. 2 Bl. Comm. 429; Pierce v. Proprietors of Cemetery, 10 R. I. 227. It seems the owner of the lot could bring an action of trespass *quare clausum fregit*, and this was held to be the only action lying for disturbing the remains of a deceased child, additional damages being in this case allowed for injury to feeling because the act was willful or wanton. Meagher v. Driscoll, 99 Mass. 281. It would not be allowable to maintain such a suit as the present under the assumption that the injury is to the person. In the old division of legal wrongs, "injuries to the person" do not include everything which the word "person" may be fairly understood to cover. Thus in Ohio and Illinois there is a statute giving the wife a right of action against any person intoxicating the husband, whereby she was injured in person, property, or means of support. In both States it is held that she cannot recover under such statute for mental anguish, even when entitled to damages on other grounds, as that is not an injury to the person. Mulford v. Clewell, 21 Ohio St. 191; Freese v. Tripp, 70 Ill. 496. In Illinois some of the judges dissented from the majority opinion, but all agreed that mental anguish alone would not make a cause of action.

The law protects the person and the purse. The person includes the reputation. Johnson v. Bradstreet Co., 87 Ga. 79, 13 S. E. Rep. 250. The body, reputation, and property of citizens are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries. The case of Telegraph Co. v. Rogers, *supra*, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have been infrequent in the past. If their foundation principle be sanctioned, they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity. If they are unable to do this, then, on principle, any mental suffering would be actionable, the degree of it merely determining the quantum of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages, at least; in other words, there must be an infraction of some legal right of the plaintiff. Then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not a ground for damages which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages? We have seen that, though allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actual damage, unless mental suffering be such, when it is simply assumed that it is actual damage. Throwing away the lame pretense of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be to recover when no other damage is claimed, why is not the causing of mental suffering itself an infraction of a legal right? Why should the law of torts lag behind the law of damages? Can it do so in a sound system?

PUBLIC CORPORATION BONDS—RECITALS THEREON AND THEIR LEGAL EFFECT.

II.

Recitals on Void Bonds.—A most interesting question arises as to whether, for the purpose of estoppel, the recitals on the bond may be used when the bond itself is held void for want of legislative authority to issue it.[1] As, for example, where the recital is, that in consideration of the performance of the contract (named), the corporation acknowledged itself to be indebted, etc., and the bond is held void for want of legislative power to issue it; and in a suit for money had and received, the void bond being introduced to show the amount and terms of the debt, and it being necessary, under the pleadings of the case and rulings of the court, to prove the performance of the contract *supra*, would the corporation be estopped by the above recital on the bond from denying the performance of the contract? On this question both text-writers and the courts waver and are not clear and settled. The weight of authority is, however, in support of the doctrine that in such a case as the above, the corporation is estopped from denying a fair statement of a fact made in its bond when it supposed it had the power to issue it. It would be encouraging gross fraud, to allow a corporation to make an admission, on its bonds, or a recital of the performance of some requisite condition precedent, for the purpose of aiding in the sale of its bonds, and then simply because the bond containing the admission, or recital, was held void for want of legislative power to issue it, the corporation being permitted to deny all the admissions or recitals made thereon. The bonds are not the debt. They are only the statement of the debt—the written evidence of the debt. And if money is borrowed on such illegal or mistaken evidence of the borrowing—the public corporation is bound, the same as a private corporation, or an individual, to refund, or pay back the money so borrowed, with legal interest. And the note, certificate of indebtedness, or bond of the corporation, while void for want of power to issue it, may be used as evidence of borrowing, in support of an action to compel the restoration of the money and interest, while a suit could not be maintained on the instrument itself. It is not a question of legislative authority, but of evidence, and must be settled by the rules of evidence. It is certainly very hard to determine why a written statement, or admission, or a recital on a bond under seal should not be as absolutely binding on the corporation which makes it, as any other records of the corporation, and it ought to be much more so, as it has been placed there to enhance the value and sale of negotiable securities under the law merchant, and to lead parties to purchase who are too far removed to make personal examination as to the facts recited; and why the admission, statement, or recital of the fact should be any the less true and binding upon the corporation, because the bond on which it was made, is void for want of legislative power to issue it, it is exceedingly difficult to determine, or find good law to sustain such a doctrine. Each case must generally be judged by itself; but these recitals are written, carefully prepared documentary evidence, and when certain, and not ambiguous, cannot be overcome by oral testimony, and if at all, only by evidence of similar kind and greater weight.

Recitals are only as to matters of fact, and cannot estop as to matters of law.[2] When, therefore, the bond is held void for want of legislative power to issue it, it is only a question of law that is decided, and the recitals of the facts remains as true and binding (or should do so, as a matter of principle), as if the bond had been held valid. At least to all questions, save the validity of the bond; and should be used as binding evidence for all points covered by them in any proceeding to recover the money represented in the void bond. For there are many cases, where the bonds being held void for want of authority to issue them, there seems to be no remedy for the holder of the bonds. A great wrong done, and no power to right it—so unjust are our laws and so inequitable the rulings of our courts. But where there is a remedy, as often occurs by a proceeding for money had and received, or rarely by a chancery action, the rule would seem fairly established, that recitals in such cases, at least, are bind-

[1] Bangor Savings Bank v. City of Stillwater, Chicago Legal News, July 23, 1892, p. 381; Town of Concord v. Savings Bank, 92 U. S. 625; Dillon Mun. Corp., vol. 1 (3d ed.), §§ 530 to 538.

[2] Block v. Commissioners, 99 U. S. 686.

ing, and the corporation estopped from denying them.

It is a conceded rule that there can be no *bona fide* holding of a void bond, for the purpose of estoppel in a suit to collect it, and the reason of this rule is, that under the law merchant, and reference to negotiable securities, the *bona fide* holders must know that there was legislative power for the issue of his bond. If, therefore, his bond is void, for this reason he is to blame for not knowing what he is required by law to know. And yet, in most cases, only discreet calamity judges, who, in many cases are searching for an excuse to hold the bonds void, can determine the invalidity. Under the above rule, he has a right to rely upon the recitals made by the other party to the contract, as to all matters of compliance with precedent conditions, and to the lawful exercise of the power by the corporate officials in the issue of the bonds purchased.[3] There is a broad principle here, and there is no reason why holding the bonds void for want of power to issue them, necessarily affects, or destroys the truth of the recitals contained thereon, as evidence in support of any collateral proceedings to collect the money the void bond represents. No legislative power is needed for the officials to make the recitals. The officers making them (and for that reason the corporation) knows whether they are true, or not. If true when placed upon the corporate bond, they must always remain true. Placing them on the bond does not affect their veracity—only their affect when used upon a void bond. If they are not true, the corporation should be bound by them; otherwise the corporation is aided in escaping payment of its debt, by virtue of fraudulent statements of its officers, and the courts judicially sustain the corporate fraud.

In Sherman Co. v. Simons,[4] the court said: "*bona fide* holder, for value before maturity of a bond issued by a county, is not bound to go behind the recitals in the bonds, to inquire whether the amount of the indebtedness of the corporation, exceeds that authorized by law. And when a statute directs an official to examine and determine the amount of indebtedness of a county, for the purpose of further determining the amount of bonds to be issued by the county, for a given purpose, and the officer performs the duty, the court cannot, in a suit by a holder of a bond, issued as a result of the exercises of the power of the officers, set up that the finding was not true." And further (*Ib.* 737). "A purchaser of bonds was not required to make further inquiry, and if the finding of the commissioners was untrue, he could not be affected by its falsity."

In the above case, the corporate officials exercise a judicial function, that of determining the amount of indebtedness authorized by law. The official judicial guess in that case as to the amount of indebtedness the corporation could incur under the law, was a poor one, and the recital false in that respect, and yet the bonds or coupons were held valid.

Recitals of Restriction and Limitation.—There is a class of corporate bonds with recitals of limitations, as to the power granted by the Legislative Act to some specific purpose, or confined to some definite sum to be raised, or fixed rate of taxation. One of the leading cases of the former, is Loan Association v. Topeka.[5] The bonds recited on their face, that they were payable to the King Wrought Iron Bridge Manufacturing and Iron-Works Co., of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka etc., on a suit to collect coupons from these bonds, they were held void by the United States Supreme Court, because the legislature had no power to authorize public taxation, for the benefit of a private corporation. The recitals declared the fact, that the purpose for which the bonds were issued were not within the rule established by that court for a public corporate purpose; that the benefit to the public was secondary, if anything, and was too remote. The court holding that the validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose.[6] "It is, therefore, to be inferred that when the legislature of a State authorizes a county or city

[3] Orleans v. Platt, 99 U. S. 682; Hackett v. Ottawa, *Ib.* 86; Cromwell v. Sac, 96 *Ib.* 51.
Sherman County v. Simon, 109 U. S. 735.

[5] Loan Association v. Topeka, 20 Wall. 655. See Dillon Mun. Corp. vol. 1 (3d ed.), § 510. Also, Pine Grove v. Talcott, 19 Wall. 677.

[6] Sharpless v. Mayor of Philadelphia, 21 Pa. St. 147, 167; Hanson v. Vernon, 27 Iowa, 28; Allen v. Inhabitants of Jay, 60 Me. 127.

to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or some general statute, a limitation upon the power of taxation, which repels such an inference." (*Ib.* p. 66.) The Legislative power in this case, was ample, giving the city council power to encourage the establishment of manufactories, and such other enterprises as would tend to develop and improve the city by appropriations from the general fund, or issuance of bonds payable within twenty years, at not over ten per cent.

The Constitution of the State of Kansas, §5, Art. 12, is as follows: "Provisions shall be made by general law, for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power." This article of the constitution leaves the matter of the issue of bonds to the Legislature and the cities to determine. They both acted, and the bonds were issued. But the court, following the recitals, as to the purpose of the issue, held that there was an implied limitation of the uses for which the power may be exercised. If there had been no recital that the bonds were issued, as above, to a private corporation, but to———, or bearer, and the pleadings remained the same, the court must have held them valid. The court cites Cooley on Constitutional Limitations.[7] "Taxes are burdens or charges imposed by the legislature, upon person or property, to raise money for public purposes." But, all this granted, who is to determine what is a public purpose? May not the Legislature and the corporation whose people have to pay the taxes, be relied upon to determine this question with as much wisdom as a divided court? The dissenting opinion, by Judge Clifford, seem the better law. On (page 669 *Ib.*) he says: "Courts cannot nullify an act of the State Legislature on vague ground that they think it opposed to a latent spirit, supposed to pervade or underlie the constitution, where neither the terms, nor implications of the instrument, disclose any such restrictions. Such a power is denied by the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism."[8] In the class of public corporate bonds referred to *supra*, where the recitals specify the amount of taxes that may be levied annually, or the rate of taxation, the case of the United States v. Macon Co.,[9] is, perhaps a leading case. There, the empowering act reads: "It shall be lawful for the corporate authority of any city or town, or the county court of any county, desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not exceeding one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

In such cases, the question is largely one of construction. The rule is, that the intention of the legislature,[10] under constitutional limitations must prevail, and that the language should, if possible, be construed to make effective and beneficial the empowering act.[11] Most of these acts were undoubtedly intended to enhance the value and sale of the bonds on which such recitals were placed. And the intention in most cases unquestionably was, that such specified amount or fixed rates of taxation was to be granted above all other amounts and rate of taxation. But the Federal courts have held strenuously to these limitations, to the almost entire destruction of the debt. Judgments being given in the above case,[12] one-twentieth of one per cent. only of which can be collected. The mere statement of such a case demonstrates the absurdity of such a construction. No legislature could be guilty of passing a law that empowered a corporation to contract a debt, and give it the power to pay but one-twentieth of one per cent. of the debt, when it became due. Nor could any one be such a fool as to invest in such funds, did they even dream that such a construction could possibly be placed upon the recitals by any court. It is in direct conflict with all

[7] Cooley on Constitutional Limitations, 479.

[8] Walker v. Cincinnati, 21 Ohio St. 41; Golden v. Prince, 3 Wash. C. C. 313.

[9] United States v. Macon County, 99 U. S. 582; Jones v. Macon County, 144 U. S. 568; United States v. County of Clark, 96 U. S. 211.

[10] Oates v. National Bank, 100 U. S. 244; United States v. Kirby, 7 Wall. 482.

[11] The People v. Board of Commissioners, 3 Scam. (Ill.) 153; Sedgwick on Const. and Stat. Constr. 196; United States v. Kirby, 7 Wall. 482; Wilkinson v. Leland, 2 Pet. 627.

[12] United States v. Macon County, 99 U. S. 582.

that long line of decisions of the Federal courts, which held that the power to create the debt, carried with it the implied power to pay it, in cases where there was no statutory provision for payment. In United States v. New Orleans,[13] the court says: "We have already treated of this, and said that the authority to create the debt implies an obligation to pay it, and when no special mode of doing so is provided, it is implied that it is to be done in the ordinary way, by levy and collection of taxes." Again, on (*Ib.* p. 395), "When, therefore, a power to contract a debt is conferred, it must hold that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome, except by express words, excluding it." Up to within a short time, the last cited case seemed to be the doctrine. But in the cases of Merrill v. Monticello,[14] Claiborne County v. Brooks,[15] the City of Brenham v. The German American Bank[16], that venerable court seems to have taken a new departure. It is true in the class of bonds we are considering, it must even remain largely a question of construction. But when there are two views of construction, one for honesty and the payment of a debt, and the other for rank and absolute repudiation, it ought not to embarrass any court to decide at once such a proposition. The leading case, Loan Association v. Topeka,[17] rests upon an implied power in the Kansas Constitution and a divided court, and the United States v. Macon County,[18] rests upon that case and upon a construction of the recitals which allows a collection possible of only one-twentieth of one per cent. of the debt. No wonder boards of arbitration are called for to take the place of our courts, and that the people are taking the judicial prerogatives into their own hands wherever it can be safely done. A reaction, however, has already commenced, wherein the Supreme Court of Massachusetts refused to follow the doctrine of the United States Supreme Court, as laid down in the Merrill v. Monticello case.[19] That court holding in Commonwealth v. Town of Williamstown,[20]—that where there was power to borrow money, there was an implied power to pay for the same, by the issue of negotiable bonds, where the legislature provided no express manner by which said loan could be paid.

Another class of bonds most interesting as to recitals, are those issued more especially in Illinois and Missouri, where the vote authorizing them was had before some legislative or constitutional prohibition and the bonds issued after it went into effect. These are perhaps, the most uncertain of all public corporate bonds. Illinois has now in default, issues of these bonds in eleven counties, and some six or eight cities and towns. The Federal courts seem to be holding, that the bonds being issued after the constitutional or legislative prohibition went into effect, they are *prima facie* void, and the binding proof is upon the bond holder, even though he be a *bona fide* holder,[21] to prove that conditions precedent to the issue of the bonds and necessary thereto. It is difficult to determine on what principle of law, recitals on this class of bonds are ignored. The passage of prohibitory acts of the legislature or the constitution ought not to affect the veracity of recitals, or the power of officials to make them. And especially since the schedules submitting these prohibitory acts to the vote of the people expressly exempted from the effect of the prohibitory acts, all contracts made before such acts went into effect. And, furthermore, the Illinois legislature extended the time three times, and to January 1880, for completion of contracts with railroads for work and the issue for bonds therefor. The weight of authority is overwhelmingly in support of sustaining the recitals on this class of bonds, voted before the constitutional prohibition of 1870, went into effect July 2, 1870, and issued thereafter. Bonds so voted and issued in Illinois, were held valid in the fol-

[13] United States v. New Orleans, 98 U. S. 394; Ralls County v. United States, 105 U. S. 735; Commonwealth v. Commissioners, 37 Pa. 277; Lowell v. Boston, 111 Mass.; Hasbrouck v. Milwaukee, 25 Wis. 122.

[14] Merrill v. Monticello, 138 U. S. 673.

[15] Claiborne Co. v. Brooks, 111 *Ib.* 400.

[16] City of Brenham v. The German American Bank, 44 U. S. 173.

[17] Loan Association v. Topeka, 20 Wall. 655.

[18] United States v. Macon Co., 99 U. S. 582.

[19] Merrill v. Monticello, 138 U. S. 673.

[20] Commonwealth v. Town of Williamstown, Feb. 22, 1892, 30 N. E. Rep. 472 and citations; Harvard Law Review, Nov. No., vol. 5, p. 157 & vol. 6, No 2, May 1892, p. 73, Able Articles, by Frank W. Hackett

[21] Citizens' Savings & Loan Association v. Perry Co. Ill., now pending in the U. S. Court; Port v. Pulask Co., U. S. Circuit Court of Appeals, Chicago.

fowing cases, in the United States Supreme Court: Insurance Co. v. Bruce,[22] Oregon v. Jennings,[23] County of Clay v. Society for Savings,[24] County of Warren v. Marcy,[25] Town of Coloma v. Eaves,[26] County of Moultrie v. Savings Bank,[27] Wade v. Walnut,[28] Pana v. Bowler,[29] Bonham v. Needles,[30] Harter v. Kennochan.[31] The only case of importance on this question, decided by the United States Supreme Court on this class of cases, is that of German Savings Bank v. the County of Franklin,[32] based on the decision of the State Supreme Court in Eagle v. Kohn.[33]

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[22] Insurance v. Bruce, 105 U. S. 328.
[23] Oregon v. Jennings, 119 *Ib.* 74.
[24] County of Clay v. Society of Savings, 104 *Ib.* 579.
[25] County of Warren v. Marcy, 79 *Ib.* 96.
[26] Town of Coloma v. Eaves, 92 *Ib.* 484.
[27] County of Moultrie v. Savings Bank, 92 U. S. 631.
[28] Wade v. Walnut, 103 *Ib.* 683.
[29] Pana v. Bowler, 107 *Ib.* 539.
[30] Bonham v. Needles, 103 *Ib.* 648.
[31] Harter v. Kennochan, 103 *Ib.* 562.
[32] German Savings Bank v. Franklin Co., 128 *Ib.* 526.
[33] Eagle v. Kohn, 84 Ills. 292.

CARRIERS—OF GOODS—WAREHOUSEMEN.

EAST TENNESSEE, V. & G. RY. CO. V. KELLY.

Supreme Court of Tennessee, Oct. 14, 1892.

1. A carrier is not liable as such for goods placed in its warehouse after transportation, although the consignee may have had no opportunity to remove them, because told they were not there, but its liability is that only of a warehouseman.

2. Where goods are placed by a carrier in its warehouse, and the consignee inquires for them a number of times, but is told each time they are not there, the carrier is liable as a warehouseman for their destruction by fire, notwithstanding the fire may have occurred without any negligence on its part, as the failure to deliver was the proximate cause.

CALDWELL, J.: This suit was brought by J. W. Kelly before a justice of the peace to recover from the East Tennessee, Virginia & Georgia Railway Company, the value of five barrels of whisky. He recovered judgment for $492, and on appeal the circuit judge, sitting without a jury, affirmed the magistrate's judgment, adding interest thereto. The railway company has appealed in error, and in this court, as below, denies the liability either as common carrier or warehouseman. Kelly purchased five barrels of whisky in New York, and caused them to be consigned to himself at Chattanooga, his place of business. The East Tennessee, Virginia & Georgia Railway Company was the last carrier over whose line the goods passed. On the 24th day of April, 1891, that company unloaded the whisky from its car, and stored the same in its depot at Chattanooga, where it remained until the morning of the 29th of the same month, when it was destroyed by fire. Kelly, through his drayman, called at the depot, and demanded the whisky on the 25th, 26th, 27th, and 28th of April, generally twice a day, and was each time told by the company's agent that it was not there. How the fire was produced is not disclosed. Under these facts the railway company is not liable as a common carrier. Its carrier responsibility terminated when the goods were safely stored in its depot, and before they were destroyed. Butler v. Railroad Co., 8 Lea, 32; Express Co. v. Kaufman, 12 Heisk. (last paragraph) 165. We are aware that the authorities are in a state of irreconcilable conflict on this question, several of the States having followed the lead of Massachusetts in holding that the liability of the common carrier as such is ended when the transportation is completed, and the goods are safely stored; and several others having given their sanction to the doctrine announced in New Hampshire, to the effect that the carrier's responsibility continues until the consignee has had a reasonable opportunity, after the arrival of the goods, to receive them. Discussion of the respective considerations upon which the two rules are rested by their opposing adherents will not be indulged in in this opinion, since this court has heretofore adopted the Massachusetts rule, and no sufficient reason for changing the precedent already established is perceived. The cases of Butler v. Railroad Co., 8 Lea, 32, and Express Co. v. Kaufman, 12 Heisk. 165, have been followed in several important cases, the last of which was East Tennessee, V. & G. Ry. Co. v. Gettys, (decided at present term). In 2 Amer. & Eng. Enc. Law, pp. 391-394, the two rules are stated, and many of the decisions in support of each cited. Tennessee is there erroneously referred to as one of the States adopting the New Hampshire doctrine. See, also, on same subject Story Bailm. § 543; Schouler, Bailm. (2d Ed. by Mechem), §§ 367-374, inclusive. The last author, in section 370, correctly places Tennessee among the States following the Massachusetts rule. Then, as to these goods, at the time of their destruction, the railway company had ceased be a common carrier with the liability of an insurer, and had assumed the less hazardous position of warehouseman, in which it was bound to use ordinary care and diligence only, and was responsible alone for the consequences of its negligence. Schouler, Bailm. §§ 101, 513; Lancaster Mills v. Merchants Cotton Press Co., 89 Tenn. 35, 36, 14 S. W. Rep. 317.

Is the railway company liable as warehouseman? If the loss resulted from its negligence as the proximate cause, yes; if not, no; for the doctrine of proximate and remote cause applies here, as in any other case where negligence is the ground for action. The burden of showing negligence and its causal connection with the loss

was upon the plaintiff. Schouler, Bailm. § 101; 89 Tenn. 35, 36, 14 S. W. Rep. 317; Louisville & N. Ry. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. Rep. 314; Hutch. Carr. (2d Ed.) § 767. In this case there is no proof as to the cause of the fire, hence the defendant is not chargeable with negligence in causing it. Mere proof of the fire and destruction of the goods does not show negligence. Louisville & N. Ry. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. Rep. 314, 89 Tenn. 36, 14 S. W. Rep. 317. Therefore, if the plaintiff succeed, he must do so without reference to the cause of the fire. It is distinctly shown that he demanded the goods several times, and that the defendant, without sufficient excuse, failed to deliver them. That alone makes a clear case of negligence; but, manifestly, that negligence did not cause the fire. Did it, nevertheless, proximately cause the loss of the goods? The fire and the loss may have had different causes. The fire destroyed the goods, but it does not follow that the cause of the fire and the cause of the loss to the plaintiff were one and the same in legal contemplation. They may have been entirely different. The failure to deliver the goods when demanded did not cause the fire, but it did cause the loss, in such sense that they would not have been lost without that failure. Had the defendant delivered the goods, they would have been removed, and the loss averted. The neglect and wrongful detention of the goods, and that alone, exposed them to the fire, and but for that detention they would not have been destroyed though the fire did occur. Thus it becomes obvious that the negligence of the railway company was the proximate cause of the loss. "The causal connection between the failure to deliver the goods and the injury to the plaintiff is complete.

In a late case where a train broke in two, thereby exposing cotton on the rear section to a fire, which consumed it, this court, speaking through Judge Snodgrass, said: "The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter. Illustrating by these facts, it is true that fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train, while it was being removed, happened, so that, but for this fact, the cotton would have been saved. Thus [the breaking of the train] must therefore be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it." Deming v. Storage Co., 90 Tenn. 353, 17 S. W. Rep. 89. That definition and illustration of proximate cause is conclusive of this case. There, as here, the fire which consumed the goods was caused without the fault of the defendant, and there, as here, the goods became exposed to the fire through the negligence of the defendant, but for which the injury would not have been inflicted. There, as here, that negligence, and not the fire or its cause, proximately caused the loss to the owner. Lamont v. Railroad Co., 9 Heisk. 58, is not in conflict with the case last cited, or the decision here made.

Our attention has been called to several cases from other States. In that of Railroad Co. Arms, decided by the Supreme Court of Nebraska, and reported in 17 N. W. Rep. 351, the consignee called for his goods several times after their arrival, and was told each time by the company's agent that they had not been received. Thereafter, without any other negligence on the part of the company, its depot was burned, and the goods destroyed. The owner recovered the value of his goods. In Faulkner v. Hart, 82 N. Y. 413, the goods were called for upon arrival at destination, but delivery was refused until the next day, because it was not "convenient" then to deliver them. The warehouse and goods were destroyed that night by fire. The defendant was held liable for the loss. In Railroad Co. v. Morrison, a Kansas case, reported in 9 Pac. Rep. 225, the owner demanded his trunk, and was informed it had not come. The company's depot was subsequently entered, the trunk broken open, and robbed by burglars, without fault of the company. The owner obtained judgment for the contents of his trunk. In Railroad Co. v. Benson, 86 Ga. 203, 12 S. E. Rep. 357, there was a deviation in route of shipment, causing some delay, and, after arrival of the goods, demand was made, and delivery refused. The goods were thereafter destroyed in depot by an unprecedented flood, and, upon suit being brought, the company was held liable for their value. Though decided upon similar facts, those cases are not of much importance here, because in each of them the defendant was adjudged liable as common carrier, and that without reference to the question as to whether or not its negligence proximately caused the injury. In the Georgia case the court said that the wrongful acts of the company constituted a conversion of the goods. A mere inadvertent statement by the agent to the owner demanding goods, then in the company's depot, that they have not arrived, is not a conversion. Railroad Co. v. Campbell, 7 Heisk. 258. For the reasons stated, the railway company is liable in this case as warehouseman. The goods having been totally destroyed, the measure of damages was the value of the goods at Chattanooga. Hutch. Carr. § 769; Phoenix Ins. Co. v. Erie Transp. Co., 117 U. S. 322, 6 Sup. Ct. Rep. 750, 1176; Railway Co. v. Jurey, 111 U. S. 585, 4 Sup. Ct. Rep. 566; Dean v. Vaccaro, 2 Head, 489; Erie Dispatch v. Johnson, 87 Tenn. 490, 11 S. W. Rep. 441.

Affirm the judgment, with costs.

NOTE.—*The liability of common carriers, for goods received by them for carriage, before and after transit.* —Taking up the first of the subdivisions it may be stated to be the rule that, where delivery of goods is made at warehouse or other place of business of carrier, to be forwarded in the usual course of business, its liability as such, immediately attaches, and is not postponed until goods are actually put in motion towards the place of destination. Pittsburg etc., R. R. v. Barrett, 3 Am. & Eng. R. R. Cas. 256; Mason v. Ry., 25 Mo. App. 473; O'Bannon v. S. E. Co., 51 Ala. 481. If such goods are destroyed by fire or lost in warehouse of carrier before shipment, carrier is responsible as such, unless his common-law liability is changed by special contract. Pittsburg etc., Ry. v. Burrett, 36 Ohio St. 448; Ill. Cent. Ry. v. Smyser, 38 Ill. 354; Merriam v. H. & N. H. Ry., 20 Conn. 354; Grand Tower Co. v. Ullman, 89 Ill. 244. By statute in Texas see 49 Tex. 748. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge or consent. Grosvenor v. N. Y. C. Ry., 39 N. Y. 34; 21 Ind. 54; 23 Conn. 591; 32 Wis. 85. The presumption arises where goods are so delivered and accepted by carrier, and nothing remains for the consignor to do to them, that the acceptance is in fact, to forward immediately and solely as common carrier. Grand Tower Co. v. Ullman, *supra;* Nichols v. Smith, 115 Mass. 332; Hickox v. Nangatuck Ry., 31 Conn. 281. This presumption seems to hold, even if goods be delivered unusually early if accepted by the carrier, the acceptance is deemed to be one for immediate transportation and carrier will be liable as such, even though goods lie at wharf, at depot, freight house or elsewhere, and are not stored for transit. Clark v. Needles, 25 Penn. St. 338; F., etc. Ry. v. Hanna, 6 Gray, 539; Schouler on Bailments, § 390.

If goods are left to await further orders of consignor to forward same the carrier's liability is that of a warehouseman. Cairs v. Robins, 8 M. & W. 258. Or that goods shall be held as part of a lot to await transportation, until the whole is delivered, though authorized (not directed) to carry in portions, carrier's liability is that only of warehouseman until the whole lot is delivered. Watts v. Boston, etc. Ry., 106 Mass. 466; and see (Tex.) 1 S. W. Rep. 446. And wherever the bailment relation following transfer of possession indicates no duty of immediate or present transportation, but rather that carrier shall await consignor's further acts and instructions, and delay is for consignor's convenience, the carrier will not be liable as such but simply as warehouseman or ordinary bailee. St. Louis, etc. Ry. v. Montgomery, 39 Ill. 335; Finn v. Western Ry., 102 Mass. 283; Schouler on Bailments, § 390.

Coming now to the second subdivision of the subject the authorities are in a state of irreconcilable conflict. As stated in the main case there seem to be two recognized rules, known as the Massachusetts and New Hampshire. The Massachusetts rule is as follows: When the transit is ended, and the carrier has placed the goods in its warehouse to await delivery to the consignee, its liability as carrier is ended also, and it is responsible as warehouseman only. This rule has been substantially adopted and followed in Massachusetts, Indiana, Iowa, California, Pennsylvania, Illinois, Missouri and Tennessee. Thomas v. Ry., 10 Met. 472; Norway Plains Co. v. Ry., 1 Gray, 263; Rice v. Hart, 118 Mass. 201; Bansemer v. Toledo Ry., 25 Ind. 434; Francis v. Dubuque Ry., 25 Iowa, 60; Jackson v. Ry., 23 Cal. 268; McCarty v. Ry., 30 Penn. St. 247; Neal v. Ry., 8 Jones Law, 482; Porter v. Chicago Ry., 20 Ill. 407; Gashweiler v. Wabash Ry., 83 Mo. 112.

In Francis v. Ry., *supra*, it is intimated that a different rule might prevail if goods failed to arrive on time, and consignee had been active in endeavor to find them, or to ascertain the probable time of their arrival and no notice was given him by the company when they did arrive. In Chicago Ry. Co. v. Bensley, 69 Ill. 630, it was held, in order to terminate carrier's liability as such, that goods must be actually unloaded and placed in store, and that liability as carrier is not terminated by placing car with goods in freight depot of company at place of termination of carriage. See also Chicago, etc. Ry. v. Sawyer, 69 Ill. 285. Under the Massachusetts rule no notice to the consignee is required, the liability of the carrier as such terminates upon storage of goods. Bansemer v. Ry., *supra;* Norway Plains Co. v. Ry. *supra.* (Mass.) In California this has been modified by local legislation, and storage of goods at point of destination will not relieve carrier of its liability as such, unless upon arrival of goods notice has been given consignee. See Wilson v. Cal., etc. Ry., 94 Cal. 166. In Rice v. Hart, *supra*, carrier was held only as warehouseman, even though, before a loss occurred, no reasonable opportunity was given consignee to remove goods, carriers liability however held to continue as such until goods were properly discharged and stored. The above rule can be modified by special contract. In Tanner v. Oil Creek Ry., 53 Penn. St. 411, it was held that freight agent may bind a railroad company by his promise to give notice of the arrival of the goods. Railways are not bound to deliver to consignee personally. Porter v. R. R. Co., *supra.*

The New Hampshire doctrine, which is followed by the more conservative authorities holds, that merely placing goods in warehouse does not discharge carrier, but that he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away, in the common course of business. It is followed in New Hampshire, New York, Alabama, Wisconsin, Connecticut, Louisiana, Vermont, Iowa, Kansas and Ohio. Faulkner v. Hart, 82 N. Y. 413; Mobile Ry. v. Prewit, 46 Ala. 67; Moses v. Boston & Maine Ry., 32 N. H. 523; Graves v. Hartford S. Co., 38 Conn. 143; Maignon v. New Orleans Ry., 24 La. Ann. 333; Leavenworth Ry. v. Maria, 16 Kan. 333; Railway v. Little, 86 Ala. 159; Columbus, etc. Ry. v. Ludden (Ala.), 31 Cent. L. J. 89, with note; Lake Erie, etc. Ry. v. Hatch, 6 Ohio Circuit Court R. 230; Parker v. Ry., 30 Wis. 689; Blumenthals v. Brainard, 38 Vt. 402; Mohr v. C. & N. Ry., 40 Iowa, 579. This rule would naturally require the carrier to give notice of the arrival of the goods. Maignon v. Ry., *supra;* Michigan Ry. v. Ward, 2 Mich. 538; McDonald v. R. R. Corp., 34 N. Y. 479; Hedge v. Hudson River Ry., 6 Robertson, 120. Cases following the above doctrine concede that the point at which the carrier's liability as such will cease depends in some measure at least, upon custom of particular places, usage of particular trades, or special contract between the parties (Hustonn v. Peters, 1 Met. Ky. 561); and that after a reasonable time carrier is liable only as warehouseman. Columbus, etc. v. Ludden, *supra.*

As to what is a reasonable time see rule stated by Sawyer, J. in Moses v. Boston, etc. Ry., *supra.* The above rule has been substantially embodied in Texas by local legislation. See H. & T. Ry. Co. v. Adams, 49 Tex. 748. The Massachusetts rule has the merit of being definite and easy of application, and may in many cases, avoid a painful controversy as to what, under the circumstances, is a reasonable time within

which the consignee must appear and take goods. The liability of the carrier as insurer under it continues until goods are properly unloaded and stored, and after such storage the carrier must still exercise ordinary care and answer in damages for negligent storage occasioning loss or injury to the goods. The rule in certain cases would undoubtedly work great hardship on the consignee. See 82 N. Y. 413. It is urged that the New Hampshire rule is more consonant with public policy and which only they who condemn the policy of making the carrier an insurer, until reasonable time has elapsed for consignee to obtain goods, can consistently ask to dispense with. I have been unable to find the opinion of the Supreme Court of the United States on this subject, if the point has been decided there. The tendency of that court has however not been toward limiting the carriers common-law liability.

T. G. ROMBAUER.

BOOKS RECEIVED.

Commentaries on the Laws of England: By Sir William Blackstone Knt., one of the Justices in his Majesty's Court of Common Pleas. In one Volume, together with a Copious Glossary of Legal Terms Employed; also, Biographical Sketches of Writers referred to; and a Chart of Descent of English Sovereigns. Edited by Wm. Hardcastle Browne, A. M., of the Philadelphia Bar. Author of a "Commentary on the Law of Divorce and Alimony," etc. New York; L. K. Strouse & Co., Law Publishers, 63 Nassau Street. 1892.

The Law of Public Health and Safety, and the Powers and Duties of Boards of Health. By Leroy Parker, Vice-dean of the Buffalo Law School, formerly President of the Michigan State Board of Health, and Robert H. Worthington, of the New York Bar. Albany, N. Y., Matthew Bender. 1892.

Modern Equity. Commentaries on Modern Equity Jurisprudence as Determined by the Courts and Statutes of England and the United States. By James Fisk Beach, Jr., of the New York Bar. Author of "Contributory Negligence," "Private Corporations," "The Modern Law of Railways," "The Law of Receivers," "The Law of Wills," Etc.; Editor of "The American Probate Reports," Etc., and Sometime Editor of "The Railway and Corporation Law Journal." In Two Volumes. New York: Baker, Voorhis and Company. 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Allowance of Claim.—An order of a county judge, duly made, without fraud or collusion, allowing a claim against the estate of a deceased person, is a final order, and, unless appealed from, will be conclusive and have the effect of a judgment, and not be open to collateral attack.—YEATMAN v. YEATMAN, Neb., 53 N. W. Rep. 385.

2. ADMINISTRATION — Money Recovered.—Gen. Laws 1891, ch. 123, does not make the amount recovered by an administrator or executor for wrongfully causing the death of deceased subject to payment of all debts incurred by the deceased for the support of himself and family, but, at most, only to such as were incurred in consequence of, or, at any rate, after, the injury causing the death.—STATE v. PROBATE COURT OF DAKOTA COUNTY, Minn., 53 N. W. Rep. 463.

3. ADMINISTRATION — Settlement—Bond on Appeal.—Rev. St. 1881, § 2454, provides that any person aggrieved by a decision of a circuit court in any matter connected with a decedent's estate may appeal to the supreme court upon filing a bond, with a penalty in double the amount in controversy; and section 2455, as amended in 1885, provides that such bond shall be filed within 10 days after the decision, unless the court to which the appeal is prayed shall direct such appeal to be granted on filing such bond within one year from such decision: Held that, in order to perfect such an appeal, the filing of a bond was a necessary step, and unless filed within the prescribed time the appeal would be dismissed.—TEN BROOK v. MAXWELL, Ind., 32 N. E. Rep. 106.

4. ADMINISTRATOR — Negligence.—An administrator who has instituted an action to recover insurance on the life of his intestate is not negligent in failing to appear in the action, where the heirs have appeared by their attorney, asserting their right to the money as against one claiming under an assignment by the intestate in his life-time; and such administrator is not liable for the loss of the money to the estate by reason of the insolvency of the assignee, to whom it was paid under a judgment which was subsequently reversed on appeal.—MEYERINGH v. WENDT, Iowa, 53 N. W. Rep. 414.

5. APPEAL—Dismissal.—Where a party has appealed to the supreme court, and is unable to procure the settlement of the bill of exceptions by reason of the death of the trial judge, he may dismiss his appeal for the purpose of applying for a new trial, without regard to whether or not a new trial will be refused.—OELBERMAN v. NEWMAN, Wis., 53 N. W. Rep. 451.

6. APPEAL—Encroachment of Highway.—If, in an action by the State to recover a forfeiture for an encroachment on a public highway, under Rev. St. § 1331, a judgment is rendered against the State, an appeal therefrom can only be taken by the district attorney or the attorney general.—STATE v. DUFF, Wis., 53 N. W. Rep. 446.

7. APPEAL—Practice—Rehearing.—An application for rehearing will not be entertained unless a petition is filed, or at least leave granted therefor, during the term at which the judgment is entered, as provided by the twenty-fourth rule of this court.—WRIGHT v. SHERMAN, S. Dak., 53 N. W. Rep. 425.

8. APPEAL—Presumption.—In this court the presumption is in favor of the correctness of the finding of fact by the trial court, and such finding will not be reversed unless clearly wrong.—BICKEL v. MCALEER, Neb., 53 N. W. Rep. 374.

9. APPEAL IN CRIMINAL CASES.—An error of the county court in dismissing an appeal from a justice of the peace, because the appeal bond is not marked "Approved," and does not have the file mark of the justice, is harmless, where the record from the justice's court shows no judgment in that court, as there is nothing to appeal from.—ROBBINS v. STATE, Tex., 20 S. W. Rep. 359.

10. APPEALABLE ORDERS — Supplementary Proceedings.—An order upon disclosure in proceedings supplementary to execution, directing the payment of money by the judgment debtor, is appealable.—CHRISTENSEN V. TOSTEVEN, Minn., 53 N. W. Rep. 461.

11. APPELLATE COURT—Jurisdiction.—Where a complaint seeks to have a judgment rendered some years previously against plaintiff set aside, on the ground that the court rendering the judgment had no jurisdiction over the person of the plaintiff, and it does not appear on its face that the judgment was void, it being an original action, and not one for the recovery of money only, and the relief demanded being equitable, an appeal therein is not within the jurisdiction of the appellate court, but should be brought before the supreme court.—CONKEY V. CONDER, Ind., 12 N. E. Rep. 94.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS—Description of Property.—1 Mills' Ann. St. ch. 9, §§ 169, 170, provide that any person may make a general assignment of "all his property," real and personal, for the benefit of creditors, by deed: Held, that an assignment which described the property as "all of the accounts, debts, dues, notes, bills, bonds, and demands, goods, wares, and merchandise, named and specified in a schedule and inventory to be hereafter filed," and contained no other words evidencing an intention to convey all the property of the assignor, was void, as indicating a special assignment.—PALMER V. MCCARTHY, Colo., 31 Pac. Rep. 241.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS—Intervention.—An assignee for the benefit of creditors, in the absence of peculiar facts, has no such interest in the "matter in litigation" as entitles him to intervene to defend a purely personal action against his assignor.—MCCLURG V. STATE BINDERY CO., S. Dak., 53 N. W. Rep. 428.

14. ATTACHMENT BOND — Property of Non-resident.—An action upon an undertaking for an attachment is one arising upon contract, and may be maintained by an attachment against the property of a non-resident. The fact that the damages are unliquidated does not change the character of the action.—WITHERS V. BRITTAIN, Neb., 53 N. W. Rep. 375.

15. ATTORNEY AND CLIENT—Evidence.—In an action by one attorney against another for services rendered, the defendant filed a plea of payment and set-off for services rendered plaintiff: Held, that where there was evidence that the services were rendered by defendant on the understanding that no charge would be made therefor, and that no such charge was made on defendant's books, the court properly charged that, if such services were voluntarily rendered without any intention of charging plaintiff therefor, the jury should find for plaintiff as to that item.—MCFADDEN V. TERRIS, Ind., 32 N. E. Rep. 107.

16. BANK DEPOSIT—Assignment.—The giving of a check by a bank depositor for the full amount of the deposit does not operate as an assignment to the holder of the check, so as to enable him to enforce payment thereon against the bank prior to its acceptance of the check.—FIRST NAT. BANK OF UNION MILLS V. CLARK, N. Y., 32 N. E. Rep. 38.

17. BONDS—Compliance with Requirements.—While a statutory bond must conform substantially to the requirement of the statute in respect to penalty, conditions, form, and number of sureties, yet where two or more sureties are required, and it is signed by but one, who by his words or acts waives additional sureties, he will be held liable.—GRAY V. SCHOOL DIST. OF NORFOLK, Neb., 53 N. W. Rep. 377.

18. BOUNDARIES—Fence.—Sanb. & B. Ann. St. § 1392*a*, provides that, where an owner of land builds a fence before a boundary line is established between him and adjoining land by the county surveyor, and, after the boundary line is so settled, such fence proves to be on the adjoining land, the party who built the fence shall own the same, provided he removes it to the boundary line on notice served on him by the adjoining owner: Held that, where a fence was built after the boundary line had been settled by the county surveyor, such fence became a part of the realty, and the adjoining owner could remove it at his pleasure.—SCHOLL V. KINITZER, Wis., 53 N. W. Rep. 451.

19. CARRIERS — Passengers—Electric Cars.—A passenger, while passing from the motor to the trailer of an electric street railway train by swinging from the step of one to the other, grasping the iron handles on the dash-boards between them, was injured by receiving an electrical shock, the handles being charged with electricity which had escaped as the result of improper insulation of the wires conducting the motive power: Held that, the company having the means of readily ascertaining whether electricity was escaping, it was chargeable with notice that its apparatus was in a defective condition, and that, in such event, the iron handles would become charged.—BURT V. DOUGLAS COUNTY ST. RY. CO., Wis., 53 N. W. Rep. 447.

20. CARRIERS OF PASSENGER— Street Railroads.—The fact that a lady, familiar with travel on a certain street railroad, and who was injured by the too sudden starting of a car from which she was endeavoring to alight, had requested the conductor to let her off at a certain place, does not require the conductor, in the exercise of due care, to give the lady express notice of the stoppage of the car at that place, or require any other action on his part than a reasonable stop; although the making of the request might, with other circumstances, be considered as bearing upon the questions of negligence and contributory negligence. — ROBINSON V. NORTHAMPTON ST. RY. CO., Mass., 32 N. E. Rep. 1.

21. CHATTEL MORTGAGE — Acknowledgment. — A chattel mortgage, duly drawn, executed and delivered, contained the grantor's name in the body of the instrument. The certificate of acknowledgment attached thereto stated that "personally came——,to me known to be the identical person whose name is affixed," etc.: Held, that the certificate was valid under Code, § 1958, providing that the officer taking the acknowledgment shall certify that the person making the acknowledgment was personally known to him, and acknowledged the instrument to be his free act.—MILNER V. NELSON, Iowa, 53 N. W. Rep. 405.

22. CONSTITUTIONAL LAW — Elections — Ballot.—Pol. Code, §§ 1197, 1205, as amended by St. 1891, ch. 130, provide that the names of all political parties which have filed certificates of nomination of candidates in accordance with the statutory requirements shall be printed, in separate lines, at the head of the official ballot, and that an elector who desires to vote any such party ticket straight may do so by putting a cross opposite the mame of such party; but a ballot so marked shall not be counted, if marked in any other place, except to indicate a vote on a constitutional amendment or other question: Held, that such sections were unconstitutional, as resulting in the partial or total disenfranchisement of any elector so voting unless his party had a full State and local ticket.—EATON V. BROWN, Cal., 31 Pac. Rep. 250.

23. CONTRACT — Architect's Certificate.— Where it is stipulated in a contract for the erection of a house that it shall be built according to the plans, and to the "satisfaction" of the architect, his certificate that he accepts the work as done in accordance with the plans and specifications is conclusive on the owners, and cannot be contradicted by them.—KENNEDY V. POOR, Pa., 25 Atl. Rep. 119.

24. CONTRACT—Drilling Well.—Plaintiffs, in their contract with defendant for drilling a well, guarantied to get "the water from the bed rock," unless they should find good water, acceptable to defendant, at a less depth: Held, that the contract was satisfied by getting bed-rock water, and could not be construed as guarantying good water, or as presenting a case of ambiguity admitting of evidence of the circumstances under which it was made to give such a meaning to the words.—BOOK V. NEW CASTLE WIRE NAIL CO., Pa., 25 Atl. Rep. 120.

25. CONTRACT—Excuse for Non-performance. — The fact that an unbridged river between defendants' residence and the place of performance was swollen by recent rains, and impassable at the time set for the performance of the contract, will not bring defendants' non-performance within Civil Code, § 1511, providing that perfomance of an obligation will be excused "when it is prevented or delayed by an irresistible and superhuman cause," where it is not shown that such a condition of the river was unusual at that season of the year, and could not have been anticipated by ordinary prudence.—RYAN V. ROGERS, Cal., 31 Pac. Rep. 244.

26. CONTRACT—Release of Co-surety—Consideration.—Where an agreement by a surety to exonerate his co-surety from liability is based on the co-surety's promise to become a surety on another bond, failure of the co-surety to perform the promise is such a failure of consideration as will release the first surety from liability on the agreement to exonerate, and will enable him to enforce contribution from such co-surety.—DAVEYAC V. SEILER, Ky., 20 S. W. Rep. 875.

27. CONTRACT—Sale.—The fact that a mortgagee of a stock of goods was clerking in the store of the mortgagor when the latter purchased additional goods as "agent," does not render the former liable for the price of such goods, where the mortgagor was not agent of the mortgagee, and the latter received no benefit from the goods.—STEELE V. WATSON, Iowa, 53 N. W. Rep. 420.

28. CONTRIBUTION BETWEEN HEIRS.—Where an ancestor's land has been divided among his heirs, each of them is liable to contribute to the satisfaction of a lien subsisting against the entire tract; and, on their failure so to do, each one's allotment should be sold to pay his proportionate share, but a court of equity will not subject to the payment of the entire lien one of the parcels, which has been purchased under a judgment against the heir to whom it had been allotted.—SMITH'S EX'X V. MCMILLAN, Ky., 20 S. W. Rep. 382.

29. CRIMINAL EVIDENCE—Burglary.—Two photograph galleries were burglarized in a town on the same night, and lenses stolen from both were found in defendant's possession. Defendant claimed that he had received lenses from one J, under contract as a carrier: Held, on defendant's trial for burglary of one of the galleries, that it was competent to admit evidence in regard to the burglary of the other as establishing the *res gestæ*, and as a circumstance tending to connect defendant with the crime charged. — KELLY V. STATE, Tex., 20 S. W. Rep. 365.

30. CRIMINAL EVIDENCE—Murder.—In a trial for the murder of his wife, evidence was properly admitted of repeated acts of violence and threats by defendant to kill his wife during a number of years covering nearly the entire period of their married life, as bearing on the question of motive for committing the crime.—COMMONWEALTH V. HOLMES, Mass., 32 N. E. Rep. 6.

31. CRIMINAL LAW—Assault—Instructions.—Where the evidence for defendant showed that whatever was done by defendant was done under the provocation of an unexpected assault by the witness, the court erred in failing to charge the jury that, if death had resulted from the injury inflicted, and the jury should believe it would have been manslaughter, then they should find defendant guilty of aggravated assault.—DOW V. STATE, Tex., 20 S. W. Rep. 366.

32. CRIMINAL LAW — Intoxication as a Defense to Crime.—Pen. Code, art. 40*a*, which provides that temporary insanity, produced by the recent use of intoxicating liquors, does not destroy responsibility for crime, when defendant, sane and responsible, made himself voluntarily intoxicated, applies only to insanity caused by the recent use of intoxicating liquors, and not to delirium tremens, the immediate cause of which is generally an abstinence from liquor after a prolonged intoxication, and which is always an involuntary result thereof.—KELLY V. STATE, Tex., 20 S. W. Rep. 357.

33. CRIMINAL LAW — Larceny. — Defendant was indicted under a statute making the theft of $10 a misdemeanor, and the theft of $30 a felony. On the trial there was evidence that defendant took three $10 bills from the pocket of a sleeping traveler, and when the latter awoke defendant dropped two of the bills, and fled with the other one: Held, that the court properly refused to charge that, if defendant intended to appropriate one of the bills only, he should be convicted of a misdemeanor. — FENNER V. STATE, Tex., 20 S. W. Rep. 355.

34. CRIMINAL LAW—Murder—Evidence.—The first and second counts in an indictment for murder alleged that the death was caused by a wound on the head, produced by a blow with an axe. The evidence showed that this wound was fatal, though it might or might not have caused instant death, and that there was also a cut in the throat, made with the axe at the same time, which would have caused death quickly from bleeding: Held, that there was no variance; the fact that the wound which caused death was in the throat instead of on the temple, if the jury so found or that its size and shape were not exactly as alleged being immaterial.—COMMONWEALTH V. COY, Mass., 3 N. E. Rep. 4.

35. CRIMINAL LAW—Receiving Stolen Goods.—On a trial for receiving stolen goods, though defendant alleges that he received them to sell on commission, yet the factsthat he inquired of the person from whom he received them as to where he got them; that they were delivered to him at night, and arranged on the floor in the form of a bed, and covered,—are sufficient to justify a finding by the jury that he knew they were stolen.—MURIO V. STATE, Tex., 20 S. W. Rep. 356.

36. CRIMINAL LAW—Record on Appeal.—Where there is no statement of facts nor bill of exceptions in the record in a criminal case, it will be presumed, on appeal by defendant, that the evidence showed that the crime was committed at the time alleged, and by defendant.—GREEN V. STATE, Tex., 20 S. W. Rep. 366.

37. CRIMINAL LAW—Sentence — Imprisonment.— It is the duty of a court, under the "Act regarding sentences in criminal cases," approved June 12, 1891, to provide in a sentence imposing a fine and costs a period of time for which the convict shall be imprisoned in the county jail in default of payment of the fine and costs, and the omission to do so is error for which the judgment or sentence will be reversed, and the convict remanded for sentence in compliance with the act, but not for a new trial.— ROBERTS V. STATE, Fla., 11 South. Rep. 536.

38. CRIMINAL PRACTICE— Admission to Bail.—An application for admission to bail on the ground that accused is suffering from a complication of diseases, and requires "judicious exercise, proper food and medical treatment," will be refused where it does not appear that he cannot receive proper care and treatment at the hands of the jail authorities.—EX PARTE MEADOR, Tex., 20 S W. Rep. 371.

39. CRIMINAL PRACTICE—Indictment.—An indictment reciting, "The grand jurors for the county of B, State aforesaid, duly organized as such at the May term, A. D. 1892, of the district court of said county, upon their oaths in said court present that George Bell," etc., sufficiently shows on its face that it was presented in the district court of B county.—BELL V. STATE, Tex., 20 S. W. Rep. 362.

40. CRIMINAL PRACTICE—Murder.—Sanb. & B. Ann. St. § 752*a*, providing that the circuit judges are authorized, in their discretion to appoint "counsel" to assist the district attorney in the prosecution of persons charged with a crime punishable by imprisonment in the penitentiary: Held, that a resident and attorney of another State was not eligible to be appointed to assist the district attorney in the prosecution of a person for murder in the first degree.—STATE V. RUSSELL, Wis., 53 N. W. Rep. 441.

41. CRIMINAL TRIAL — Recalling Jury.—Rev. St. 1879, art. 1321, provides that the instructions may be carried

by the jury to their room, and an additional charge may be given upon any question of law arising in the case "upon the application of the jury therefor in open court:" Held that, on a trial for horse theft, the court could of its own motion, under the latter provision, recall the jury after their retirement and instruct them as to the law of circumstantial evidence, if the defendant was present.—BENEVIDES v. STATE, Tex., 20 S. W. Rep. 369.

42. CRIMINAL TRIAL—Witness — Examination.—In a prosecution for perjury at a murder trial, a question, "What did defendant say on that trial with reference to where he and the alleged murderer were when the shots were fired?" is not objectionable as leading, because it indicates no particular answer.—HAYS v. STATE, Tex., 20 S. W. Rep. 361.

43. DEATH BY WRONGFUL ACT—Compromise.—An action by an administrator for the wrongful death of his intestate, brought under Mill and V. Code, § 3130, "for the use and benefit of the widow and children," cannot be compromised by the widow without the consent of the children or administrator.—KNOXVILLE, C. G. & L. R. CO. v. ACUFF, Tenn., 20 S. W. Rep. 348.

44. DEED—Condition—Support of Grantor.—The surrender of a deed conditioned on the grantee's supporting the grantor during his life-time will not divert the grantee's title; and where such grantee has performed the condition for several years before the surrender, a court of equity will not cancel the deed, after the grantor's death, at the instance of a second grantee, to whom the grantor had conveyed on a like condition, under the belief that the surrender reinvested him with the title; but the sum expended by the second grantee in the performance of the condition will be declared a lien on the land.—MARTIN v. MARTIN, Ky., 20 S. W. Rep. 375.

45. DESCENT — Inheritance. — Under Acts 22d Gen. Assem. ch. 85, § 1, which prohibits non-resident aliens from holding lands by descent, devise, purchase, or otherwise, a resident, whose father is a non-resident alien, cannot inherit from his resident uncle (his father's brother), since he would derive his title immediately through his father, and not immediately from his uncle.—FURENES v. MICKLESON, Iowa, 53 N. W. Rep. 416.

46. DISCOVERY.—Though plaintiff may examine defendant as a witness in a court of law, where a bill for discovery makes a case cognizable in equity, it is not subject to demurrer on the ground that plaintiff has an adequate remedy at law.—WOOD v. HUDSON, Ala., 11 South. Rep. 530.

37. EJECTMENT—Evidence.—In ejectment, where the title of both parties is derived from the same common source, the records of court proceedings under which defendant acquired his title are admissible.—COCHRAN v. SANDERSON, Pa., 25 Atl. Rep. 121.

48. ELECTIONS AND VOTERS—Certificates of Nomination.—When no certificate of original nomination has been filed in the office of the secretary of State, there can be no substitution of names, because the secretary of State has nothing in his office showing who had been originally nominated for the office, and whose place the substitute is to fill.—LUCAS v. RINGSREED, S. Dak., 53 N. W. Rep. 426.

49. EQUITY—Rescission — Misrepresentations. — In a suit by the purchaser of a lease of coal land to rescind the contract on the ground of misrepresentation, complainant and another witness testified that defendant's secretary represented that the output of the mills averaged between 200 and 250 tons per day. The secretary denied the statement, and he was corroborated by counsel for defendant, who was present during the negotiations. Complainant had sent two competent persons to examine the property, and it does not appear but that the output would depend entirely on the force employed: Held, that the evidence failed to show a misrepresentation concerning a material matter which operated as a material inducement to the purchase.—CHAMBERLIN v. FOX COAL & COKE CO., Tenn., 20 S. W. Rep. 345.

50. ESTOPPEL BY DEED.—Where a deed is executed solely to enable the grantor to negotiate a mortgage given by the grantee as part of the same transaction, and the property is immediately reconveyed to him by an unrecorded deed, the grantor is not estopped to assert his title as against such grantee, when sued by the latter to compel him to account for the money realized from the mortgage, and from a subsequent sale of the premises to a third person, to whom the grantee had conveyed by direction of grantor.—NEIBUHR v. SCHERYER, N. Y., 32 N. E. Rep. 13.

51. EVIDENCE—Sale—Res Gestæ.—In an action for the price of a reaper alleged to have been delivered to and accepted by defendant in pursuance of a verbal contract of sale, declarations by defendant made several days after the alleged contract was entered into, and while the machine was being set up, that it was brought to him to be exhibited as a sample by plaintiff's agent, and not in pursuance of any contract of sale, are not admissible as part of the *res gestæ*, as such declarations are not contemporaneous with the main fact in issue—the making of the alleged contract of sale.—HOOVER v. CARY, Iowa, 53 N. W. Rep. 415.

52. EXECUTORS AND ADMINISTRATORS—Limitation.—Hill's Code, § 18, provides that "if a person, against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within six months after the issuing of letters testamentary or of administration:" Held, that the section does not limit the time of bringing an action against an administrator, on a claim not barred by the general statute of limitations, within six months after his appointment.—BLASKOWER v. STEEL, Oreg., 31 Pac. Rep. 253.

53. FIXTURES—Mortgagor.—Plaintiff entered into possession of mortgaged premises under an agreement with the mortgagor, to which the mortgagee was not a party, that he should pay off the mortgage and receive a deed of the premises, and that he might make improvements, and, if he failed to pay the mortgage, remove them. Thereafter he joined the mortgagor in another mortgage, after which the first mortgage was foreclosed, he being made defendant, and asserting no title to the improvements: Held that, as against parties claiming title under the foreclosure sale, plaintiff had no right to the improvements, the mortgagee not being bound by the agreement between plaintiff and the mortgagor.—MCFADDEN v. ALLEN, N. Y., 32 N. E. Rep. 21.

54. FORCIBLE ENTRY AND DETAINER.—Where a grantee of real estate, on receiving his deed takes undisputed possession of the property conveyed, and in good faith continues possession thereof, by himself, his agent, or tenant causing the premises to be fenced and cultivated, such facts constitute a prior possession, which will entitle such grantee or tenant to prosecute one by whom he is dispossessed, for forcible entry and detention.—GALLIGHER v. CONNELL, Neb., 53 N. W. Rep. 383.

55. FRAUDS, STATUTE OF—Sale.—D contracted orally to sell and deliver to M, in marketable condition, growing grain. The grain belonged to D, but labor, skill, and money were necessarily to be expended in order to deliver the grain in marketable condition. No money was paid or grain delivered when the contract was made: Held, that the sale was not within the exceptions to the statute of frauds, under Code, § 3665, providing that when the property sold is not owned by the vendor, and ready for delivery, but labor, skill, and money are necessarily to be expended in producing or procuring the same, the statute does not apply.—MIGHELL v. DOUGHERTY, Iowa, 53 N. W. Rep. 402.

56. FRAUDULENT CONVEYANCE — Evidence.—It is not sufficient that the vendor desires to defeat the payment of a claim by the transfer of his property; to render the conveyance fraudulent it must be taken with knowledge, actual or constructive, of the proposed

fraud, or there must be a want of consideration.—FARRINGTON V. STONE, Neb., 53 N. W. Rep. 389.

57. GARNISHMENT—Joint Answer.—Where the record in a garnishment suit shows that the garnishees were proceeded against jointly, one summons having issued against both, one motion for judgment against both having been made, and one judgment entered, they will be regarded as joint defendants, and the answer of one will be evidence for both on the trial.—POLLOCK V. JONES, Ala., 11 South. Rep. 529.

58. GUARANTY—Construction. — Defendant promised W to be responsible for any lumber he might sell M until further notice. Afterwards W entered into partnership with the other plaintiffs, and the firm furnished M lumber without making any further arrangements with defendant: Held, that defendant could not be held responsible for the lumber so furnished.—HOLMES V. SMALL, Mass., 32 N. E. Rep. 3.

59. GUARDIAN'S BOND.—A guardian filed a bond with satisfactory sureties at the time of his appointment, and afterwards, on receiving additional money belonging to his wards, was required to file another bond. There was nothing to indicate an intention to make the second bond subsidiary to the first, but it appeared to be given as primary security: Held, that it was not necessary to exhaust the remedies against the obligors in the first bond before bringing suit on the second, all being equally liable.—STATE V. MITCHELL, Ind., 32 N. E. Rep. 86.

60. HOMESTEAD—Exemption.—Under Gen. St. ch. 38, art. 13, § 10, which exempts from coercive sale land not exceeding $1,000 in value, occupied by the debtor as a homestead, a debtor who has for many years occupied a lot as a homestead cannot claim as exempt an adjoining lot, which he had leased to tenants during all this time, and which he had never occupied or claimed as a homestead until after the debt in question was created, and after the action to recover judgment therefor was begun, and process actually served on him.—TOHERMES V. BEISER, Ky., 20 S. W. Rep. 379.

61. INJUNCTION BOND—Damages.—Where a bond, given by a person to obtain an injunction releasing property taken under an execution issued on a personal judgment against him, and restraining the collection of such judgment on the ground that it is void, is for all damages sustained by the judgment creditor by reason of such injunction, and where, on the hearing of such injunction, the bill in the original action is dismissed and the injunction dissolved, the measure of damages, in an action on the bond by the judgment creditor, is the interest on the judgment for the time the injunction was in force, and not the amount of the judgment, interests, and costs.—NEAL V. TAYLOR, Ark., 20 S. W. Rep. 352.

62. INSANITY — Adjudication—Restoration.—One who allows nearly six years to elapse, after having been adjudged an incompetent, is not entitled to a writ of *mandamus* to compel the setting aside of such adjudication, merely on jurisdictional grounds, thus affecting injuriously those who have acted in reliance upon the jurisdiction, but is entitled to a hearing on the merits, as that he has since become competent.—COOT V. IONIA PROBATE JUDGE, Mich., 53 N. W. Rep. 395.

63. INSURANCE—Rights of Mortgagee.—Where an insurance policy procured by the owner of the fee provides for the payment of the loss to the mortgagee as his interest may appear, an accord and satisfaction entered into between the insurer and the owner is not a bar to a recovery by the mortgagee from the insurer of his damages, as his right thereto appeared on the face of the policy, in which he had a vested interest, and which constitutes a contract between himself, the owner, and the insurer.—HATHAWAY V. ORIENT INS. CO., N. Y., 32 N. E. Rep. 40.

64. INSURANCE — Subrogation.—Where an insurance company, on settling a loss, is subrogated to a portion of a claim of its insured against one through whose negligence the loss was caused, such insurance company cannot bring an action to recover only its portion of such claim.—CONTINENTAL INS. CO. V. H. M. LOUD & SONS LUMBER CO., Mich., 53 N. W. Rep. 394.

66. INSURANCE—"Vacant" Dwellings.—In the by-law of a mutual insurance company, providing it will not insure "unoccupied" dwelling houses, and will not be liable for any loss on any dwelling house which has been "vacant" for 30 days previous to the loss, the word "vacant" is used as the equivalent of "unoccupied," with the signification of "uninhabited."—DOHLANTRY V. BLUE MOUNDS FIRE & LIGHTENING INS. CO., Wis., 53 N. W. Rep. 448.

66. INTOXICATING LIQUORS — License.—Under Gen. Laws 1885, ch. 296, providing that, if any person sells any intoxicating liquor in any quantity without first having obtained a license therefor, he is guilty of a misdemeanor, the agent of a brewing company who sells beer without a license, to a dealer in a town other than the one in which such company's brewery is located, is guilty of such offense.—MAYER V. STATE, Wis., 53 N. W. Rep. 444.

67. JUDGMENT—Publication—Jurisdiction.—In an action to enforce a pecuniary liability against a non-resident, where the process is served by publication, and he does not voluntarily appear, and no property is attached, the court acquires no jurisdiction, and any judgment that may be rendered is a nullity, and no bar to another suit on the same cause of action.—PLUMMER V. HATTON, Minn., 53 N. W. Rep. 460.

68. LANDLORD AND TENANT—Forcible Entry.—In an action for forcible entry and detainer, where it appeared that defendant occupied a building for several months, paying rent by the month, but there was no evidence that the lease was for one month or for a definite time, it was not error to charge that 30 days' notice to quit was necessary.—HISLOP V. MOLDENHAUER, Oreg., 31 Pac. Rep. 252.

69. LANDLORD AND TENANT—Lease.—An owner leased land under a lease, which was to continue for a certain time, unless the indebtedness of himself and brothers was sooner paid, the stipulation being that, after certain expenses, the proceeds of crops were to be applied to any indebtedness of the lessor, and any indebtedness also of the lessor's brothers, the lessee to assign the lessor his demand against the brothers when paid: Held, on an accounting, that the lessee was entitled to credit for the entire indebtedness intended to be secured, notwithstanding part of the lessor's indebtedness had been incurred prior to a discharge in bankruptcy, and notwithstanding a previous suit against the brothers, brought to arrest the statute of limitations.—PINDALL V. LOAGUE, Ark., 20 S. W. Rep. 350.

70. LANDLORD'S LIEN.—Code, § 2017, provides that a landlord shall have a lien for rent upon crops and other personal property "which has been used upon the premises during the term:" Held, that the lien attaches to cattle used for the purpose of feeding and improving them in the ordinary way, and, where the premises are leased for the purpose of keeping cattle thereon for sale, to the cattle so kept; but where cattle kept for sale are sold in the ordinary course of business before the lien is enforced, the lien does not attach as against the purchaser.—THOMPSON V. ANDERSON, Iowa, 53 N. W. Rep. 418.

71. LIMITATION OF ACTION—Non-resident Defendant.—Code, § 2533, relating to the limitation of actions, provides that "the time during which a defendant is a non-resident of the State shall not be included:" Held, that in an action against a foreign manufacturing corporation it was error to instruct the jury that defendant could "set in operation in its own favor the statute of limitations by establishing a general agency in this State, if plaintiff knew, or by the exercise of ordinary prudence might know, that such an agent was located in this State."—WINNEY V. SANDWICH MANUF'G. CO., Iowa, 53 N. W. Rep. 421.

72. MANDAMUS TO COUNTY BOARD.—Where a board of county commissioners sustains a demurrer to a complaint of the attorney general, demanding the recovery of certain money, paid into the treasury of such county

for the credit of the school fund, but never reported to the superintendent of public instruction, the proper remedy is an appeal to the circuit court, and not an application for *mandamus* to compel the board to allow such recovery.—STATE v. BOARD OF COM'RS OF SHELBY COUNTY, Ind., 32 N. E. Rep. 92.

73. MANDAMUS TO DISTRICT JUDGE—New Trial.—Alternative writ of *mandamus* quashed, because it appeared that the motion for a new trial, which it directed the district judge to decide, was not pending before him for decision.—STATE v. JUDGE OF DISTRICT COURT OF STUTSMAN COUNTY, N. Dak., 53 N. W. Rep. 433.

74. MARINE INSURANCE—Waiver of Conditions.—A policy of insurance on a cargo of corn provided that the acts of the insurer in recovering, saving, or disposing of the property insured should not be considered as a waiver or acceptance of an abandonment, or affirming or denying any liability under the policy, but that such acts should be considered as done for the benefit of all concerned without prejudice to the right of either party: Held that, by taking possession of and selling the injured portion of the cargo, with notice that the injury was caused by ice, the insurer did not waive a provision in the policy exempting it from liability for such injury, or render itself liable to a charge of conversion.—SCHULYER v. PHENIX INS. CO. OF BROOKLYN, N. Y., 32 N. E. Rep. 25.

75. MASTER AND SERVANT—Assumption of Risk.—A seaman, who is subject to imprisonment and forfeiture of wages for disobedience of orders, (Rev. St. U. S. § 4596), does not assume the risk incident to operating an uncovered winch in obedience to the order of his superior officer; and he can recover from the vessel owners for the injuries sustained by having his hand caught in the cogs of the winch while operating it with reasonable care to avoid injury.—ELDRIDGE v. ATLAS STEAMSHIP CO., N. Y., 32 N. E. Rep. 66.

76. MASTER AND SERVANT—Defective Machinery.—While plaintiff, an employee of defendant, was cleaning a carding machine, it was set in motion by the voluntary shifting of the belt from the loose to the tight pulley, whereby plaintiff was injured. The evidence showed that the machine was of the kind in ordinary use, and with reference to the shafting was set as were like machines in the room and in other mills, and there was no special defect pointed out. There was evidence that on three prior occasions the machine had started in the same way in the presence of defendant's superintendent, but that it would not so start if the shift of the belt from the tight to the loose pulley was properly made: Held, that a nonsuit was properly directed.—DINGLEY v. STAR KNITTING CO., N. Y., 32 N. E. Rep. 35.

77. MASTER AND SERVANT — Injury to Servant.—The fact that a boy, injured while oiling a paper machine by having his hand caught in a cogwheel, is shown to have been employed about machinery for some years, and to have frequently oiled a paper machine, but not, however, one requiring him to thrust his hand into a triangular space between a series of cogs, as in the present instance, and is shown also to have known that if his hand came in contact with the cogs it would be crushed, does not justify a non suit, but the question whether from previous experience, he should have comprehended the danger, so that neither warning nor instruction was necessary, is for the jury.—CHOPIN v. BADGER PAPER CO., Wis., 53 N. W. Rep. 452.

78. MASTER AND SERVANT—Negligence of Vice Principal.—An assistant road master in control of a gang of men, and with power to direct their work and discharge any of them, is a superior servant, for whose negligent acts the master is liable.—PALMER v. MICHIGAN CENT. R. CO., Mich., 53 N. W. Rep. 397.

79. MEASURE OF DAMAGES—Injury to Boy.—In an action to recover for the negligent killing of a boy such damages as his estate may have sustained, and instruction calling attention to his expectancy of life, character, intelligence, business experience, etc., and telling the jury to make the best possible estimate therefrom of the loss, is not, considering the youth of deceased, and the meagerness of the data from which his future might have been estimated, objectionable for indefiniteness in failing to point out a specific method of calculating the probable amount of his accumulations, or in providing an abatement of interest therefrom so as to arrive at the present worth, but is as definite as practicable.—ANDREWS v. CHICAGO, M. & St. P. RY. CO., Iowa, 53 N. W. Rep. 399.

80. MECHANICS' LIENS.—Laws 1885, ch. 342, as amended by Laws 1887, ch. 420, relating to mechanic's liens, provides that if the owner shall, for the purpose of avoiding the provisions of the act, pay by collusion the contractor in advance of the terms of the contract, for the purpose of defeating persons who have furnished materials or done work on the building, he shall, notwithstanding such payment, be liable, etc.: Held, that where the owner had in good faith paid the contractor, and the contractor had paid the subcontractor in full for his work and materials, a person who furnished material and did work for the subcontractor was not entitled to a mechanic's lien, though one installment was yet unpaid by the owner to the contractor.—FRENCH v. BAUER, N. Y., 32 N. E. Rep. 77.

81. MECHANIC'S LIEN—Purchase-money Mortgage.—When the owner of land conveys to one who has caused a building to be erected on it, and at the same time takes back a mortgage for the purchase money, and prior thereto mechanic's liens have accrued in constructing the building, whether the mortgage or liens shall take precedence will depend on whether the interest of the owner (the mortgagee) was or was not, at the date of the conveyance, subject to the liens.—MCCAUSLAND v. WEST DULUTH LAND CO., Minn., 53 N. W. Rep. 464.

82. MORTGAGE — Certificate of Acknowledgment.—A certificate of acknowledgment of a deed or mortgage, in proper form, can be impeached only by the clear, convincing, and satisfactory proof that the certificate is false and fraudulent.—PHILLIPS v. BISHOP, Neb., 53 N. W. Rep. 375.

83. MORTGAGE—Foreclosure—Decree.—A decree foreclosing a mortgage upon real estate is a final judgment, upon which the parties to the suit may rely; and any change therein and modification thereof without lawful notice, particularly after the term at which it was rendered null and void.—HOMAN v. HELLMAN, Neb., 53 N. W. Rep. 369.

84 MORTGAGE — Priorities.—Two mortgages to different persons were contemporaneously executed and filed for record by the mortgagor, and afterwards mailed by him to the respective mortgagees: Held, that one of such mortgagees, who had accepted his mortgage on the faith of a prior understanding with the mortgagor that his mortgage was to be a first lien on the land, had superior equities to the other mortgagee, who accepted his mortgage the day after the acceptance of the other, with full knowledge of its existence, and who, without investigation as to which was the prior lien, then advanced to the mortgagor the amount called for in the mortgage.—UTLEY v. DUNKELBERGER, Iowa, 53 N. W. Rep. 408.

85. MORTGAGE—Taxes Paid by Assignee.—Where the assignee of a mortgagor pays a claim for delinquent taxes on the mortgaged premises, which was proved against the mortgagor's insolvent estate, after a sale under the mortgage subject to existing liens, the amount thus paid cannot be recovered of the mortgagee, though the condition of the sale was not expressed in the deed.—BROWN v. MASSACHUSETTS MUT. LIFE INS. CO., Mass., 32 N. E. Rep. 2.

86. MUNICIPAL CORPORATIONS — Defective Streets. — Pursuant to authority, defendant city's board of water commissioners by ordinance prohibited any person except their superintendent and those employed by him, or with his permission, to tap or make connection with the water mains: Held, that where the superintendent on application of a contracting plumber, employed

workmen, who were to be paid by defendant and defendant reimbursed by the plumber, to make an excavation in the street for a connection with the main, and plaintiff's horse was injured because of the negligence of the workmen in leaving the excavation unguarded, defendant is liable for the injury.—WILSON V. CITY OF TROY, N. Y., 32 N. E. Rep. 44.

87. MUNICIPAL CORPORATION—Licensing Banks.—The good faith and reasonableness of a charge against banks, imposed by a city ordinance under a law authorizing the licensing of banks, being conceded it will be presumed to be a license as it purports to be, and not a tax for revenue.—CITY OF OIL CITY V. OIL CITY TRUST CO., Penn , 25 Atl. Rep. 124.

88. MUNICIPAL CORPORATION—Tax Sale.—In the absence of charter restrictions, a city to which land was struck off at a tax sale in default of other bidders has the power to surrender the certificates of sale to the tax-payer, and to take from him a mortgage to secure the payment of the delinquent taxes, as there is no rule of public policy which requires the city to sell such certificate of sale for cash only, or which prevents its dealing directly with the owners of the land.—CITY OF BUFFALO V. BALCOM, N. Y., 32 N. E. Rep. 7.

89. NEGLIGENCE—Accidental Shooting.—Where one is armed with a revolver unlawfully, he is liable for any injuries he inflicts with the weapon, and it is immaterial that the person injured was [consenting to his being so armed and to his use of the revolver.—EVANS V. WAITE, Wis., 53 N. W. Rep. 445.

90. NEGLIGENCE—Trespasser in Railroad Yard.—Failure to give warning of the approach of a backing engine in a railroad yard, or to have a person in position to see the track ahead of it, is not such negligence as will render the company liable to a trespasser in the yard for an injury caused by being run over by such engine; and the fact that such trespasser is an infant does not affect the legal rights of the company, because signals of approaching engines must be given, and oversight of the tracks exercised, uniformly and habitually, or not at all, and for the protection and safety of all persons or none.—MCDERMOTT V. KENTUCKY CENT. RY. CO., Ky., 20 S. W. Rep. 380.

91. NEGOTIABLE INSTRUMENT—Accommodation Indorsers.—One who has indorsed a note for the accommodation of the maker on condition that the proceeds should be applied to a specified purpose cannot defend an action by a *bona fide* holder, who purchased without knowledge of the condition, on the ground that the avails of the note were diverted to other purposes.—PARKER V. MCLEAN, N. Y., 32 N. E. Rep. 73.

92. NEGOTIABLE INSTRUMENT—Accommodation Maker.—In an action by a bank on a note it appeared that defendant, a resident of New York, made the notes for accommodation of the payees, residents of another State, who indorsed it to plaintiff, situated in the same State. The indorsers were afterwards discharged in insolvency proceedings, in which plaintiff proved the note as a claim, and received a dividend thereon: Held, that the maker was not discharged from liability, since the indorsers would have been discharged as to plaintiff if it had not appeared and taken the dividend, and defendant was not injured thereby.—THIRD NAT. BANK OF SPRINGFIELD V. HASTINGS, N. Y., 32 N. E. Rep. 71.

93. NEGOTIABLE INSTRUMENT—Forgery.—On a question as to whether a judgment note is a forgery it is competent to show that the owner had in possession, about the time of entry of judgment thereon, other notes bearing the signature of the same maker, but in blank as to dates and amounts, as the possession of such blanks is a circumstance calling for explanation, whether said owner then had the present note or not, and notwithstanding an interval of several years between the date of said note and entry of judgment.—THOMAS V. MILLER, Penn., 25 Atl. Rep. 127.

94. NEGOTIABLE INSTRUMENTS — Summons. — Where there is no charge of collusion or fraud between the n dorser and holder of a promissory note as to the liability of such indorser, and an action is brought against him in the county where he resides within the State, and service had on him there, a summons may be issued and served on the makers in other counties of the State.—BELCHER V. PALMER, Neb., 53 N. W. Rep. 380.

95. PLEADING—Abatement.—The fact that a note sued on is not due, a date of maturity earlier than intended having been inserted by mistake, is a matter in abatement, and not in bar.—NORRIS V. SCOTT, Ind., 32 N. E. Rep. 103.

96. PLEADINGS — Amendments. — Defendant having filed an answer to the petition, and plaintiff thereupon filing an amended petition, to which defendant answers, without making the original answer part of the second answer, the case stands for trial on the amended pleadings, and the original pleadings are disregarded.—SMITH V. WIGTON, Neb., 53 N. W. Rep. 374.

97. PLEADING—Denial.—A denial in an answer of all material allegations in the petition, although faulty, will be held sufficient, when assailed for the first time by motion for a new trial, particularly where it is treated at the trial as putting in issue the allegations of the petition.—ROSENBAUM V. RUSSEL, Neb., 53 N. W. Rep. 384.

98. QUIETING TITLE—Decree.—In an action under Rev. St. art. 4, ch. 58, the complaint alleged and the evidence showed the plaintiff had purchased a certain lot of land of C, and had taken a deed of same, which was lost before the recording thereof; that defendant's grantor, having knowledge of the loss, fraudulently obtained deeds, of said land from the heirs of C, recorded the deeds forcibly ejected the plaintff, and sold the land to defendants, who bought knowing that plaintiff claimed the land. Plaintiff prayed that his interest in the land be declared to be an estate in fee simple. The court found that plaintiff was not entitled to relief, and dismissed the bill at plaintiff's costs: Held, that the court should have found the facts as to the execution and loss of the deed, and, if such facts were sufficient thereto, should have declared what estate was conveyed to plaintiff by said deed, and if not sufficient, should have so declared and dismissed the bill.—ANTHONY V. BEAL, Mo., 20 S. W. Rep. 326.

99. RAILROAD COMPANIES—Sale.—Where the purchaser at a mortgage foreclosure sale of the property of an insolvent railroad company continues to use for railroad purposes land which the mortgagor had condemned and taken possession of, without paying the awards therefor, the purchaser ratifies the appropriation by the mortgagor, and is liable for the amount of such awards.—NEW YORK, C. & ST. L. R. CO. V. HAMMOND, Ind., 32 N. E. Rep. 83.

100. RAILROAD COMPANIES—Stock Killing—Complaint.—In an action against a railroad company for killing horses, an allegation that the horses went on the railroad "by reason of the failure of defendant to fence and maintain cattle guards" is equivalent to an allegation that they went on the railroad at a point where it was not securely fenced, and is sufficient. — WABASH R. CO. V. FERRIS, Ind., 32 N. E. Rep. 112.

101. RAILROAD COMPANIES—Streets—Electric Railroad—Servitude.—The use of a street by an electric railroad with overhead wires and poles is not an additional servitude for which abutting owners may demand compensation.—DEAN V. ANN ARBOR ST. RY. CO., Mich., 53 N. W. Rep. 396.

102. RES JUDICATA—Identity of Parties.—The judgment against a plaintiff in an action by him in his representative capacity, as trustee for creditors, to set aside a conveyance as in fraud or creditors, based on the ground that the conveyance was free from fraud, is not conclusive against him on the question of fraud, in an action by him individually on his own account merely, against the same defendants for the same purpose.—COLLINS V. HYDORN, N. Y., 32 N. E. Rep. 69.

103. SCHOOL DISTRICT—Constitutionality of Act.—Pub. Acts 1891, No. 176, authorizes the organization of any township in the Upper Peninsula into a single school

district, and provides that, on the filing of a petition therefor signed by a majority of the township electors, the township board and school inspectors shall meetand compare the petition with the list of registered voters, and, if they find that it contains a majority thereof, they shall give notice of the election of officers for such new school district at the next township meeting: Held, that the act was not invalid, as making no provision for determining the genuineness of the signatures to the petition, nor as destroying the essential attributes of the primary school district as it existed at the formation of the constitution.—PERRIZO v. KESSLER, Mich., 53 N. W. Rep. 391.

104. TAXATION—Penalty for Evading.—Rev. St. 1881, § 6330, provides that personal property shall be listed for taxation on April 1st of each year. Section 6339 provides that, if any person or corporation shall temporarily convert any property into property not taxable, for the fraudulent purpose of evading taxation thereof, he or it shall be liable for a penalty: Held that, where defendant on March 31st converted a general deposit of money into treasury notes, not taxable, and deposited the same in the bank for safe-keeping only, until April 11th, and then returned the notes to the general deposit, he is liable for the penalty.—DURHAM v. STATE, Ind., 32 N. E. Rep. 104.

105. TAXATION — Railroad Grants. — Upon the facts stated in the petition, held, that the railway company had earned the lands in controversy at the time the taxes were levied, and that the State had prior to said levy parted with its title to the plaintiff's grantor, and that the lands were taxable, although the United States did not approve the selection of the State until after the levy of the taxes.—ELKHORN LAND & TOWN LOT CO. v. DIXON COUNTY, Neb., 53 N. W. Rep. 382.

106. TAX SALE — Validity of Deeds—Cancellation. — Where, on account of irregularities connected with the tax sale, a tax deed is set aside by the court, such deed no longer possesses any evidential force, and, in order to show that the tax for which the sale was made, or any subsequent tax, was a lawful tax, the party alleging the fact must show, by common-law proof, that the steps essential to a valid tax have been taken by the officials. A regular assessment and levy must be alleged and proved in order to recover judgment, under section 1643, Comp. Laws.—O'NEIL v. TYLER, N. Dak., 53 N. W. Rep. 434.

107. TENDER—Deposit in Bank.—For the purpose of making a tender or payment to P, R made a general deposit in a bank to the credit of P. The latter, upon being informed of it, refused to accept it: Held, that upon the administrator of P withdrawing the money from the bank it belonged to R, and that he could maintain an action for conversion upon a refusal to pay it to him.—REYNOLDS v. ST. PAUL TRUST CO., Minn., 53 N. W. Rep. 457.

108. TIE VOTE.—The Waukesha village charter, § 7, provides that, "in case of a tie between two candidates at any election, the election of one or the other of them shall be determined by lot, in the presence and under the direction of the president and trustees:" Held, where there was a tie vote for president at a village election, and the president and trustees deducted a vote from one of the candidates, and declared the other elected, that the candidate so defeated could by *mandamus* compel the president and trustees to determine the election as provided by charter. — HADFIELD v. GRACE, Wis., 53 N. W. Rep. 444.

109. TRESPASSING ANIMALS. — The person taking up stock for trespassing upon cultivated lands must comply substantially with the requirements of the herd law, particularly the giving of notice, unless the same are waived, or he will acquire no lien upon such stock. —HANSCOM v. BURMOOD, Neb., 53 N. W. Rep. 371.

110. TRIAL—Witness—Correcting Testimony.—Plaintiff who testified through an interpreter, was told by his counsel during a recess of the court that he (the plaintiff) had stated his case differently from what he had told him (the counsel). Plaintiff contended that the interpreter had misunderstood him, or the stenographer had reported him incorrectly: Held, that it was not error to permit plaintiff to take the stand and correct his testimony.—ERICKSON v. MILWAUKEE, L. S. & W. RY. CO., Mich., 53 N. W. Rep. 393.

111. TRUSTS—Limitations.—Where a trust is imposed by law, and the trustee is guilty of no fraud, the statute of limitations begins to run against the beneficiary at the time the trust is created, and not at the time of demand or a breach of the trust.—PARKS v. SATTERTHWAITE, Ind., 32 N. E. Rep. 82.

112. USURY—Renewal of Note.—Where plaintiff gave his note to a bank, and the proceeds thereof were placed to his credit on the books, the fact that afterwards plaintiff applied the amount so credited to the payment of usurious interest on a debt due the bank does not affect the validity of the note.—BROWN v. CASS COUNTY BANK, Iowa, 53 N. W. Rep. 410.

113. VENDOR AND PURCHASER—Measure of Damages.—In case of the breach of an executory contract to convey real estate, where the vendor having title refuses or puts it beyond his power to convey, and no part of the consideration has been paid, the measure of damages which the vendee is entitled to recover is the value of the land at the time the contract should have been performed, less the contract price.—CARVER v. TAYLOR, Neb., 53 N. W. Rep. 386.

114. WATERS—Overflowing Lands—Railroad Company.—Where a railroad company maintains a dam on its right of way over a water way, which constitutes a nuisance in causing the water to overflow adjacent land, it is liable therefor, though the dam was originally constructed by the county under legislative authority.—PAYNE v. KANSAS CITY, ST. J. & C. B. R. CO., Mo., 20 S. W. Rep. 322.

115. WILLS—Charitable Devises.—A devise to "foreign missionery work" is valid, under Act April 26, 1855, declaring that "no disposition of property hereafter made for any religious or charitable use shall fail for want of a trustee or by reason of the objects being indefinite, uncertain, or ceasing," and that it shall be carried into effect so far as it is ascertainable, and can, consistently with law and equity, be effectuated.—BOARD OF FOREIGN MISSIONS OF UNITED PRESBYTERIAN CHURCH v. CULP, Penn., 25 Atl. Rep. 117.

116. WILL—Devise in Lieu of Dower.—In an action for dower it appeared that plaintiff's deceased husband bequeathed her a policy of insurance on his life in lieu of dower, and that three months after his death the money due thereon was collected by the executor, and paid to plaintiff, at which time she fully understood that the bequest was in lieu of dower, and was advised of her legal rights: Held, that plaintiff elected to take under the will, although it does not appear that she gave any receipt for the money, or expressed in writing or by words that it was her purpose to take the bequest in lieu of dower.—GOODRUM v. GOODRUM, Ark., 20 S. W. Rep. 353.

117. WITNESS — Husband and Wife.—The complaint and testimony of a husband, in an action for divorce, showing the wife's refusal of intercourse, are not admissible in a subsequent proceeding affecting the property rights of a child begotten during the marriage, and while husband and wife were living together in the same house, as evidence of non-intercourse to prove the child a bastard, or that it would have been a bastard but for the wife's subsequent marriage with another before the birth of the child, and neither are letters of the wife mentioning such other as the father, under the rule that neither husband or wife are competent to prove non-intercourse when opportunity therefor exists.—IN RE SHUMAN'S ESTATE, Wis., 53 N. W. Rep. 455.

118. WITNESS—Impeachment.—Where there is a mere contradiction on an issue in a case, evidence of the good character of one of the witnesses is not admissible though the contradiction imputes to him moral turpitude, or the commission of a crime.—DIFFENDERFER v. SCOTT, Ind., 32 N. E. Rep. 87.